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IN THE

Supreme Court of the United States

October Term 1973

No. 73-1062

EDMUND ROSNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 26, 1973.

Opinions Below

The judgment of the Court of Appeals, here sought to be reviewed, is reported at 485 F.2d 1213 and is set out *infra* in the Appendix at pp. 11a-45a.* The order of the Court of Appeals denying rehearing or rehearing *en banc* is unreported and is set out in the Appendix at pp. 36a-38a.

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* "a" references refer to the appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 26, 1973. The order of the Court of Appeals denying rehearing or rehearing *en banc* was entered on November 9, 1973. On December 3, 1973, Mr. Justice Marshall signed an order extending the time to file this petition up to and including January 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

I. Where a defendant's legal strategy conferences have been overheard by government agents; where these agents are subsequently "debriefed" by the government's trial lawyers; and where information learned from these debriefings is then used by the government at trial against the defendant; must the defendant automatically be given a new trial or may the court require him to demonstrate specific prejudice as a pre-condition to such relief?

II. Where the United States Attorney's office has indicted a defendant; where the same United States Attorney's office then sends out an agent to develop cases against persons suspected of corrupt activities; and where that agent implants in the mind of that defendant the false idea that a corrupt person in the United States Attorneys office is willing to sell information that would help the defendant prepare his defense; may the defendant, who first rejected the offer, be convicted of accepting the agent's offer?

III. Where the defendant has subpoenaed the personnel and disciplinary files of the governments main witness—a city detective; and where the trial judges perusal of the

file disclosed "a number of things that [Rosner's lawyer] might have found interesting"; may the trial judge lawfully quash the subpoena on the ground that the files did not show that the witness had actually been disciplined by his superiors?

Constitutional Provisions and Statutes Involved

This case involves the Fifth and Sixth Amendments to the Constitution; and subsections 371 (conspiracy), 1503 and 1502 (obstruction of justice) and 201(b), 202 and 3237 (bribery) of Title 18, United States Code.

Statement of the Case

I. The facts giving rise to the entrapment claim

a. *The background prior to petitioner Rosner's involvement*

The uncontested facts giving rise to petitioner's entrapment claim may be summarized as follows: In December of 1970, petitioner Rosner, a practicing attorney, was indicted (along with Nicholas DeStefano and 2 others) on charges of suborning perjury in a 1967 federal criminal case involving one Pedro Hernandez. (Hereinafter, the *Hernandez* case.) Petitioner Rosner vigorously proclaimed his innocence of this charge, and the Hernandez indictment was ultimately dismissed in January of 1972. (See, *United States* v. *DiStefano* (sic) 464 F2d 845. [2nd Cir. 1972]). While the Hernandez indictment was still outstanding and while petitioner Rosner was preparing his defense to it, a government undercover agent named Robert Leuci was sent out by the United States Attorney's office to develop cases against persons suspected of corruption in the criminal justice system by offering to sell information and disposi-

tions in ongoing cases. Leuci was a New York City police detective who had himself been involved in some corruption[1] and who—at the times relevant to this case—was posing as a corrupt police official prepared to sell justice for a price. On September 28, 1971, Leuci established contact with Nick Lamattina, another New York City detective who was unaware of Leuci's undercover role. Leuci told Lamattina that he had a contact in the United States Attorney's office who might be able to provide information to friends of Lamattina who were targets of a federal corruption investigation. Two days later, Lamattina introduced Leuci to Nick DeStefano, a private investigator who, was then under indictment along with petitioner Rosner, in the *Hernandez* case. After some discussion of another matter (the *Marcone* case), Leuci heard DeStefano whisper to Lamattina "That Rosner thing is important to me too" (the "Rosner thing" was a reference to the *Hernandez* indictment). Subsequently, DeStefano told Leuci, "You know, you can help me with something else, something else I am interested in", to which Leuci replied, "I think I know what you are talking about. I think you are talking about the Rosner situation". Leuci indicated that his "friend" in the United States Attorney's office could help out and asked DeStefano what he wanted to know. DeStefano said he wanted to find out how "tight" the case was and how many witnesses there were.

b. *The initial offer to Petitioner Rosner and Rosner's rejection of it.*

On September 30, DeStefano informed petitioner Rosner that he had a contact who might be able to get information concerning the *Hernandez* case. There is no dispute that

[1] The extent of Leuci's corruption was a crucial issue at trial, see *infra* at pp. 34-35.

Rosner rejected this initial invitation to secure the information illegally. He told DeStefano that he did not want to get involved and was not interested in meeting Leuci or getting information in that way about the *Hernandez* case. (Trial transcript at pp. 200, 820-821).[2] Following this initial rejection DeStefano continued to implore Rosner to become involved. (DeStefano desired Rosner's involvement, because Rosner had the money to bankroll the purchase of the information. (Trial transcript at 218-219). Rosner testified, without dispute, that DeStefano told him that the government was preparing to indict him on another charge and was investigating the apparent disappearance of a witness in the *Hernandez* case with an eye toward indicting Rosner for his alleged murder. (835). It is again undisputed that this information was all false; indeed, the missing witness ultimately turned up in Mexico. But as a result of this misinformation, Rosner became worried and despondent and on October 4th, after DeStefano came to petitioner's law office and told him that it would be very important for him to meet with Leuci, Rosner finally agreed to attend the meeting.

c. *Petitioner Rosner's meetings with Government agent Leuci: the October 4th meeting*

At the October 4th meeting, Rosner told Leuci that it was incredible that he had been indicted in the *Hernandez* case of which he was entirely innocent. In response to Leuci's request to indicate what he wanted, Rosner specified the "3500 material" and a run-down of the witnesses. Leuci then brought up the subject of money and indicated that "something should be done" for his contact because the contact had already provided some information. (215). Four hundred dollars was then passed from Rosner to

[2] Unless otherwise indicated, transcript references apply to the transcript of petitioner's trial held between November 20, 1972 and December 5, 1972.

DeStefano to Leuci. As the meeting was breaking up DeStefano approached Leuci and, out of Rosner's hearing, told him to get Rosner "in deeper" because Rosner was the man with the money. (218-219).

ii *The October 6th Meeting*

Rosner did not attend the next meeting on October 6th, at which it was agreed that Leuci would be paid a total of $3,500 for the information; that Rosner would be told that the figure was $5,000; and that Rosner's "half"—$2,500—would thus leave DeStefano paying only $1,000. Leuci accepted this arrangement. (235). At this meeting, DeStefano asked Leuci to obtain a copy of the indictment in the *Marcone* case.

iii *The October 8th Meeting*

On October 8th, Leuci told DeStefano that he had obtained the 3500 material, and DeStefano called Rosner. Prior to Rosner's arrival, DeStefano gave Leuci $100. When Rosner arrived, Leuci handed him a copy of the 3500 material and also a copy of the *Marcone* indictment. Rosner handed back the Marcone indictment, saying "I don't have to see that". (248). Leuci was then asked to obtain a list of witnesses who would testify in the *Hernandez* case. As Rosner was leaving the meeting, he took the Marcone indictment with him, indicating he would like to study it over the weekend. (Rosner had previously been told that "the case is all about him", and he interpreted that as a reference to the *Marcone* case.)

iv *The October 12th Meeting*

On October 12th, at another meeting that Rosner did not attend, Leuci suggested to DeStefano that he tell Rosner that the grand jury minutes would cost $2,000 and that

DeStefano keep half the money for himself. DeStefano gave Leuci $1,150 for services already rendered, telling him that the money came from Rosner. Leuci also told DeStefano that the government was looking for other witnesses against Rosner so that other prosecutions could be brought against him.

v *The October 13th Meeting*

When Rosner arrived at the October 13th meeting, Leuci told him that he had not received enough money. Rosner indicated that he would receive "25" (apparently $2,500). Leuci indicated that the grand jury minutes would cost him an additional $1,000 or $1,500, and Rosner agreed that they were worth it. Rosner then transmitted $850 to Leuci through DeStefano.

vi *The October 18th Meeting*

On October 18, Leuci turned over the grand jury minutes in the Hernandez case to DeStefano. Rosner did not attend this meeting.

vii *The October 19th Meeting*

On October 19, Rosner gave DeStefano $350 to give to Leuci.

viii *The Jury Verdict*

The jury acquitted Rosner on counts 4 and 5 of the indictment, which covered the initial meetings of October 4th and 8th, and convicted him on counts 6, 7 and 8, which covered the meetings of October 12th, 13th and 19th and of conspiracy (count 1) and obstruction of justice (count 2) in relation to the events of these later dates.*

* Count 3 of the indictment was dismissed on petitioner's motion prior to trial. See 352 F. Supp. 915 (S.D.N.Y. 1972) and Appendix E printed hereafter at page 51a.

II. The facts giving rise to the right to counsel claim

a. *The Government's initial contacts with DeStefano & Lamattina, leading to them becoming government informers*

Two months after the events which gave rise to the instant indictment and entrapment claim, DeStefano and Lamattina were meeting with Leuci when they accidentally discovered that Leuci was an undercover agent. They were immediately arrested, brought to the United States Attorneys office, and told of the evidence that Leuci had secured against them. DeStefano and Lamattina were released from custody that night and permitted to leave the courthouse "with an understanding" that they had agreed to "consider cooperating" (125)[3], and to "meet with us further to consult on the question of whether there were ways in which they would cooperate with us" (111-112). They also "did agree to keep to themselves the incident that had happened that evening and the fact that [the assistant U.S. Attorneys] had talked with them and their awareness of Detective Leuci's true status" (111)[4].

Pursuant to the agreement reached on December 20, 1971, DeStefano and Lamattina "had a great many meetings" with the Assistant U.S. Attorneys, who "made continuing efforts to explore their willingness to testify or give information concerning [the Rosner] fact situation" despite DeStefano's and Lamattina's expressed unwillingness at that point to testify in that case. During this period the Rosner case was brought up repeatedly by the prosecutors: "He [DeStefano] had to be convinced that we had him

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[3] All references in parenthesis in this section refer to the transcript of the hearing on petitioner's second new trial motion.

[4] Rosner did not, at that time, know that Leuci was an undercover agent or that he had recorded their conversations. Nor, of course, did he know that the government had solicited DeStefano and Lamattina to cooperate against him.

and I talked to him about the facts of the case . . . ." (134). The Government's offer to give DeStefano and Lamattina something "in return" for their testimony and/or information in regard to the Rosner case was a continuing and open-ended one during that period (139). De Stefano and Lamattina knew that anytime prior to trial they could provide the requested information and expect something in return.[5]

In February of 1972 DeStefano began to work "in an undercover capacity for the government" (190-191), and undertook an assignment that led to another indictment (126). Lamattina also actively participated in two investigations during May and June 1972.

b. *DeStefano's and Lamattina's intrusions on Rosner's defense strategy sessions*

On June 15, 1972, newspapers disclosed Leuci's undercover role and described the Rosner case as among those in which Leuci had participated. This was Rosner's first indication that he would be prosecuted for his acts in September and October of 1971. DeStefano had known, of course, for the previous six months that Leuci was an undercover agent and that there would be a prosecution. DeStefano feigned ignorance, however, and attended several defense strategy sessions between Rosner and his attorneys at which virtually every aspect of the upcoming case was discussed. (327).

Between the indictment and the trial—a period of four and a half months—DeStefano met with Rosner many times ("too many to count") (251). On numerous occa-

[5] It was not until "some weeks before the trial" (139) that Assistant U.S. Attorney Scopetta told DeStefano that "time was running out" and that any information, if it was to be useful to the government, would have to be forthcoming.

sions he attended meetings with Rosner and his attorneys (251), both in the Rosners' law office and in the office of his other lawyers (252), at which several aspects of the Rosner case defense strategy were discussed. It is undisputed that during this critical period of time—between indictment and trial—every significant aspect of the Rosner defense strategy was discussed by Rosner and his lawyers; it is also undisputed that DeStefano overheard discussions of every aspect of the Rosner defense.[6]

c. *The Government's debriefing of DeStefano and Lamattina*

Between November 16, 1972 and November 26, 1972—the eve of the Rosner trial—a number of meetings were held between government lawyers and DeStefano and Lamattina. At the first meeting, Lamattina "told" the government lawyers that he "would cooperate with the government", but that he would "give them a final decision in a day or two" (412). Two days later, he agreed to actively cooperate with the government in the Rosner case and to attend an "initial debriefing session" on November 22, 1972. Lamattina pleaded guilty on November 20, 1972 and made a public statement to the effect that he was cooperating with the government. Government lawyers met with DeStefano four times during this period (50).[7]

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[6] Rosner's chief counsel testified as to one meeting in November on the eve of trial at which Rosner and three of his attorneys discussed the entrapment defense, Leuci's credibility, and possible pleas of guilty (457). There was a discussion of the "basic elements" of an entrapment defense as it related to the Rosner case, and Rosner's attorney gave his professional appraisal of the likelihood of success (458). DeStefano would generally arrive "unexpectedly" (334) and participate in discussions relating to defense strategy, including entrapment, and ways of explaining the material on the tape recordings (335).

[7] These meetings took place on November 16, 18, 19 & 22, 1972 (50-51). There were also some telephone conversations (53).

On November 21, 1972 DeStefano pleaded guilty, but adopted a public posture of continuing in an entirely adversary relationship with the government, concealing the fact that he had cooperated in prior investigations and was cooperating in the Rosner case.[8] On November 22, and November 24, DeStefano was debriefed by government lawyers in regard to the Rosner case.

These debriefing sessions are obviously of critical importance to this case, since they were the primary vehicle by which the information learned by DeStefano and Lamattina was transmitted to the government lawyers. It is significant, therefore, that *no record of any kind was ever made of those sessions.* No tape recording was made, no transcript or notes were taken, no memorandum was written (even subsequently for the file). It is especially difficult to understand the government's failure to preserve some written record of these critical discussions, in the face of the testimony of the chief Assistant U.S. Attorney that he had "anticipated this kind of problem", namely the problem of DeStefano having "information which he derived during the period of time when he was in counsel, so to speak, with Mr. Kreiger, Mr. Rosner or any other member of the defense team . . . ." (69-70). Having "anticipated this kind of problem", any experienced lawyer would necessarily anticipate the problem of determining precisely what information was transmitted from DeStefano and Lamattina to the government lawyers. Despite this, and for reasons best known to themselves, the government lawyers kept no record of these critical debriefing sessions. It is not

[8] The government also adopted a public posture of continuing in an entirely adversary relationship with DeStefano. Indeed the record establishes that it was not until months after the verdict—in January of 1973—that Rosner first learned of DeStefano's cooperation with the government through a chance article in the New York Times.

surprising, therefore, that great difficulty was experienced at the hearing in reconstructing the debriefing sessions and in determining precisely what information the government lawyers obtained from DeStefano and Lamattina.[9]

As a result of the Government's deliberate failure to preserve records of the debriefings, it can never be known, with any degree of certainty, precisely what information was conveyed by DeStefano and Lamattina to the Government lawyers. But it is known that DeStefano and Lamattina were debriefed in considerable detail about every aspect of the Rosner case. An Assistant U.S. Attorney testified that "we took it from day one . . ." (79-80). The government lawyers were informed by DeStefano about the Reardon case, *of which they had no prior knowledge*, and which they used extensively and damagingly on cross-examination; and they checked many other aspects of the case they were in the process of presenting. Although the government lawyers testified *at the time of these debriefing sessions* DeStefano and Lamattina were instructed "not to volunteer" information about discussions between Ros-

[9] DeStefano testified that he "talked to them [the government lawyers] about three hours, four hours" on November 22, 1972, but that he did not recall what information he gave the government lawyers. DeStefano also testified that there was another meeting which lasted for well over five hours, but that he could not remember much of what was discussed. Assistant U.S. Attorney Sagor could not even remember whether the critical discussion took place on November 22 or 24; nor could he ascertain the correct date from any document. Mr. Sagor also experienced great difficulty recalling the details of the discussion. But he did remember asking DeStefano and Lamattina "whether the general information, anything was incorrect in the indictment. . . ." (78), and he did remember that it was "mostly Detective Lamattina" who answered that question (78). Assistant U.S. Attorney Morvillo also testified about one of the debriefing sessions, although he "came in at the tail end of it" (46). There were a number of matters about which Mr. Morvillo claimed: "I just simply don't have any recollection. . . . (50) or "Gee, I am not sure. I am not sure".

ner and his lawyers, the record is clear that they had not been instructed earlier—during the critical period when they were attending meetings between Rosner and his lawyers—to refrain from securing such information.

d. *DeStefano's continued intrusion on petitioner Rosner's defense strategy sessions*

On November 20, 1972—four days *after* the beginning of the series of meetings that led to the government debriefing sessions—DeStefano again intruded on critical legal strategy sessions between Rosner and his lawyer.[10] It is not surprising that DeStefano continued to intrude on the Rosner defense meetings even after he began meeting with government lawyers about cooperating in the Rosner case, since it is undisputed that the government lawyer's failed to caution him not to intrude on such meetings, even though they were fully aware that he had been "in counsel, so to speak, with Mr. Kreiger [Rosner's chief trial counsel], Mr. Rosner or any other member of the defense team . . . ." (Transcript at pp. 69-70). Even after DeStefano had been extensively debriefed by government lawyers, he continued to attend Rosner's legal strategy meetings.[11]

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[10] That afternoon, he overheard a discussion by Rosner's attorney dealing with the tapes, inconsistencies in them and the strategic uses to which they could be put. That evening DeStefano may have participated in another meeting between Rosner and his chief counsel.

[11] As late as November 27, 1972, DeStefano overheard a two hour discussion between Rosner and two of his lawyers about the strategy of the case, which was then in the midst of trial. He also called the Rosners at home during this period several times, and spoke to Nancy Rosner, one of petitioner's counsel of record, about who was going to be called as a witness and whether character witnesses would be called, a curious inquiry for a co-defendant who had already pleaded guilty. Nancy Rosner explained the strategic reasons why the defense had decided not to call character witnesses.

It is undisputed that at the trial, the government made extensive and damaging use of information that it admittedly learned from DeStefano and Lamattina against petitioner Rosner. In particular, the *Reardon* case[12] was used extensively by the government on cross-examination. (See Trial Transcript at pp. 1001-1006). One of the prosecutors conceded that they "had no information about the Reardon case" until they were told about it by DeStefano and Lamattina. And the record establishes that DeStefano may have overheard a discussion of the Reardon case while attending a legal strategy session between Rosner and his attorneys (285-287).

III. The facts giving rise to the subpoena claim

Prior to trial, defendant's lawyer served subpoenas upon the Police Department's Internal Affairs Division and the Bronx District Attorney's office in order to obtain information concerning Robert Leuci, the Government's main witness against Rosner (Trial Transcript at p. 13). Attorneys for the New York City Police and the Bronx District Attorney opposed disclosure of the records (*Id.* at 14-15). The trial court, stating that he was "unaware of any precedent that permits anybody to rummage around in raw files (*Id.* at 23), ruled that the files were not producible to the defendant's lawyers (*Id.* at 41, 203), but agreed to inspect them himself *in camera* (*Id.* at 204). After inspecting them, he ruled that he would not order the government to "turn over any part of those files to you . . ." (*Id.* at 338), since they contained "no indication of discipline." Premising his decision on the erroneous assertion that the requested files were confidential under New

[12] The Reardon case is discussed *infra* at pp. 28-29.

York law (*Id.* at 338),[13] he held that the authorities did not require the disclosure of anything short of actual discipline (*Id.* at 339).

At the trial, on direct examination by the government, Leuci admitted his involvement in four instances of corrupt activities between late 1966 and mid-1967 (*Id.* at 764, 164-A, 353), but he vigorously denied on cross-examination any other illegal activities (*Id.* at 364). After the conclusion of the trial, defendant moved for a new trial on the ground of newly discovered evidence relating to Leuci's criminality. At the hearing on that motion, Rosner's lawyer again sought permission to see the IAD files (Transcript of proceedings, January 26, 1973, at p. 20). Though the trial judge acknowledged that there "were a number of things [in the file] that [Rosner's lawyer] might have found interesting" (*Id.* at 29), he again denied the request.

Summary of Argument

This case, which involves the conviction of an attorney on charges of bribery and obstructing justice and conspiracy to commit those acts, presents a square conflict between the circuits over a recurring and important Sixth Amendment issue central to the administration of criminal justice. The United States Court of Appeals for the Third Circuit recently held that where a government informant had overheard defense strategy, a new trial is required whether or not specific prejudice can actually be demonstrated, since actual prejudice "is incapable of realistic delineation" and the "possibility of prejudice implicit in such a situation is unlimited". The United States Court

[13] See, *People* v. *Sumpter*, 75 Misc. 2d 55, 347 N.Y.S. 2d 670 (Sp. Ct. N.Y. Co. 1973), holding such files not to be confidential under New York law and granting a motion by defense counsel for their disclosure.

of Appeals for the District of Columbia, in two cases subsequently cited with approval by this Court, held that "actual prejudice" need not be shown "in order to entitle defendants to a new trial where his legal conferences were overheard either electronically or by "means of a secret agent". And this Court held, in *Black* v. *United States*, 385 U.S. 26 (1966) and in *O'Brien* v. *United States*, 386 U.S. 345 (1967) that a new trial is automatically required whenever an unlawful intrusion has occurred. But the United States Court of Appeals for the Second Circuit, explicitly declined to follow the rule of automatic reversal for a new trial.

This case also presents this Court with a fact situation which tests—and in petitioner's view exceeds—the limits of appropriate governmental "entrapment", under the principles recently articulated in *United States* v. *Russell*, 411 U.S. 423 (1973). In this case, the United States Attorney's Office indicted an attorney on charges that were ultimately dismissed. While he was facing this charge—of which he must be presumed innocent—the same United States Attorney's office sent out an agent who offered to provide the attorney with information which would help him in his case. Initially the attorney refused this offer, but after considerable pressure, he finally agreed to pay the agent for the information. The government acknowledges that prior to meeting the agent, petitioner had no plan to attempt to secure this information; that the idea of sending out an agent willing to supply information originated with its agent; and that the crime would not have—indeed could not have—been committed were it not for the actions of its agent. This then is a paradigmatic instance where "the Government's deception actually implants the criminal design in the mind of the defendant. . . . *United States* v. *Russell* at 436.

Finally, this case involves the right of a criminal defendant, under the Sixth Amendment, to subpoena the complaint and disciplinary records of the government's undercover agent and key witness. In an effort to impeach that witnesses' testimony, petitioner sought the production of his files. The trial court quashed the subpoena, although on subsequent examination he found that there "were a number of things [in them] that [petitioner's lawyer] might have found interesting". He rested his decision on the ground that the files did not indicate that the agent, Leuci, had *actually been disciplined* as a result of any of the various complaints. Such a limitation on the right to subpoena records undercuts the Sixth Amendment, and is in direct conflict with the recent decision of the Fifth Circuit in *United States* v. *Deutsch*, 475 F2d 55 (1973).

Reasons for Granting the Writ

I

Petitioner was denied his rights under the Sixth Amendment by the lower court's refusal to order a new trial based on the government's intrusion into legal conferences with his attorneys; moreover, the lower court's decision is in direct conflict with decisions of the Third Circuit, The District of Columbia Circuit, and this Court.

It had been regarded as settled law, until the Second Circuit's decision in this case, that when a criminal defendant's legal strategy conferences with his attorney have been overheard by agents of the government, that a defendant must be given a new trial without requiring him to demonstrate specific prejudice. See e.g., *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967); *Coplon* v. *United States*, 191 F2d 749

(D.C. Cir. 1951); *Caldwell* v. *United States*, 205 F2d 879 (D.C. Cir. 1953); *United States* v. *Rispo*, 460 F2d 965 (3rd Cir. 1972). See also, *Hoffa* v. *United States*, 385 U.S. 295, 299 (1966).

In the *Coplon* case, the defendant alleged that telephone conversations between herself and her attorney were overheard; the trial court held that this allegation, if true, would not require a new trial unless there was also an actual showing of prejudice. The Court of Appeals reversed, holding that "the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred . . . regardless of whether prejudice was shown to have resulted from the denial". *Id.* at 759. "[D]emonstrable prejudice", the court held, is not required to vindicate the right, since the opportunity for prejudice is so inherent when conversations between a defendant and her lawyer are overheard. In *Caldwell* v. *United States, supra,* the court followed *Coplon* in the context—directly relevant to this case—of a Government informant in the defense camp. The court concluded that "we see no reason why intrusion by means of wiretapping should be differentiated from intrusion by means of secret agents". And it held that "In neither instance, we think, need *actual prejudice* be shown in order to entitle defendants to a new trial". *Id.* at p. 881. In *Hoffa* v. *United States, supra,* this Court assumed "that the *Coplon* and *Caldwell* case were rightly decided . . .". 385 U.S. at 307.

In *Black* v. *United States,* 385 U.S. 26 (1966), this Court, in a factual context similar to the *Coplon* case, reversed the conviction and ordered a new trial without any showing of actual prejudice. Indeed, the Court expressly considered—and rejected—a suggestion by the Government that the case be remanded for a hearing at which the issue of preju-

dice would be explored.[14] And in *O'Brien* v. *United States*, 386 U.S. 345 (1967), decided after *Black* and *Hoffa*, this Court reaffirmed the rule of automatic reversal without any requirement that actual prejudice be proved. In that case the Solicitor General disclosed that the F.B.I., while tapping a third party's phone, had overheard a single isolated statement of the defendant to one of his lawyers, requesting the lawyer "to file an application relating to the territorial conditions of his release on bail" [15] Government's brief at p. 11. This conversation was noted in the logs of the monitoring agents but was not communicated "to attorneys for the Department of Justice, including those who prosecuted this case". *Id.* at 11. Indeed, it was "not communicated in any manner outside the F.B.I." *Ibid.* The Solicitor General argued, therefore, that since "no evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations", the case should not be remanded for a new trial. *Id.* at 11-12. However, the Supreme Court—citing *Black* v. *United States, supra*—reversed the conviction and ordered a new trial, despite petitioner's implicit acknowledgement that no actual prejudice could be demonstrated. (See petitioner's reply brief in *O'Brien* at pp. 5-6). In *O'Brien*, there had not been any direct communication between those who overheard the conversation and the government lawyers. Yet the Court reversed without any finding, or even allegation, of prejudice. In this case there was, of course, extensive communication

[14] The dissenting justices agreed that the petitioner was entitled to a "full scale development of the facts" but argued that absent a showing of prejudice the conviction should stand. They recognized that the "basis" for the Court's decision "is that any governmental activity of the kind here in question *automatically* vitiates, so as at least to require a new trial, any conviction occurring during the span of such activity". *Black* v. *United States, supra* at 31 (emphasis in original).

[15] "The attorney's words were not overheard". Govt.'s Brief at p. 11.

between DeStefano and Lamattina and the Government. There is, to be sure, a dispute over whether anything that was learned by DeStefano and Lamattina from legal strategy sessions was, in fact, communicated to the government lawyers. Proof of the contents of the communications was frustrated to a degree by the prosecutors' curious failure to keep records of these meetings. There is, however, no dispute about the fact that extensive communication concerning the *Rosner* case did occur and that the opportunity for prejudicial communication did exist. This then is a far more compelling case for reversal than *O'Brien*.

The rule of automatic reversal was recently reaffirmed and applied by the United States Court of Appeals for the Third Circuit in a factual setting indistinguishable from the case at bar. In *United States* v. *Rispo*, 460 F2d 965 (3rd Cir. 1972) one of the co-defendants was a government informer. Appellants sought a new trial "regardless of whether information obtained by the informant was transmitted to the government." 460 F2d at 973. The government argued that the intrusion "has not been shown to be prejudicial, thus requiring reversal". The Court of Appeals reversed the judgments of conviction and remanded for a new trial. In doing so, it declined to inquire into whether there was actual prejudice. The court spoke of "the possibility of prejudice implicit in such a situation". It found that such a "possibility" existed despite the conclusion, required by the record in that case, that none of the information learned by the informant was "transmitted to the government". The court reasoned that the determination of whether the defendant was actually prejudiced "is incapable of realistic delineation". 460 F2d at 976. It construed the *Black-O'Brien* line of Supreme Court cases to require a new trial when "the *danger* posed by such intrusion was considered great enough . . .", without re-

gard to whether prejudice could actually be shown. *Id.* at 977 (emphasis added). Indeed, in *Rispo* the government argued that the alleged informant had not himself taken "part in conferences relating to the trial." But the court found it enough that the informer's lawyer—who "was not working for the government"—"participated in pre-trial and trial conferences and strategy sessions, and discussed these strategy sessions with him." The court found that despite evidence that the informant had never communicated any information obtained from these sessions to the government, the "possibility of prejudice implicit in such a situation is unlimited. . . ." *Id.* at 976, n. 22.

The possibility of prejudice implicit in the *Rosner* case was far greater than in *Rispo*. In *Rispo*, the defendant apparently conceded that no information obtained by the informant was transmitted to the government, see 460 F2d at 973. In *Rosner*, the government has conceded that information about the *Rosner* case *was* transmitted to the government by DeStefano and Lamattina, and it is strenuously argued by Rosner that this transmission included information learned by DeStefano and Lamattina at legal strategy sessions. At the very least, it is clear that the government lawyer's extensive debriefing of DeStefano and Lamattina after they attended strategy sessions provided ample opportunity for prejudice to have occurred, *e.g.*, for information learned at the strategy sessions to have been communicated—consciously or unconsciously, directly or indirectly—to the government. The opportunity for undemonstrable prejudice was magnified by the government's deliberate failure to keep any records of the debriefing sessions.

The lower court in this case explicitly declined to follow the automatic reversal rule applied by the Third Circuit in *Rispo*, by the District of Columbia Circuit in *Coplon*

and *Caldwell*, and by this Court in *Black* and *O'Brien*. The Second Circuit, in its opinion below, refused to apply the rule on the untenable ground, *inter alia*, that a "holding that the *per se* rule applied to this case would mean an ultimate dismissal of the indictment," since "there is nothing tangible to exclude from the new trial . . . ." (37a-38a). That is simply not true. At a new trial, all evidence obtained from DeStefano and Lamattina—for example, the evidence relating to the *Reardon* case which the government concededly obtained from them—could be excluded.

Another reason given by the Second Circuit for refusing to follow the "per se" rule is that "a *per se* rule must, in any event, be thought of in terms of sanction against the government rather than a search for truth". (36a). This is also not so. The rationale of the *per se* rule—as stated in the cases and commentaries—is precisely to aid in the "search for truth". Its underlying assumption is that there will often be cases where prejudice may well have occurred, but where it will be "difficult" to demonstrate such prejudice.[16] Accordingly, the defendant is "relieve[d]" of the "particularly impossible burden of proving that the unconstitutional conduct caused actual harm to him".[17] If the courts were to demand a showing of prejudice under these circumstances, they would necessarily be affirming a certain—though indeterminable—number of convictions where prejudice actually occurred but where it could not be proved. Thus the courts have reasonably decided that the policies of the constitution require it to err on the side of requiring a new trial in some cases where prejudice may not have occurred, rather than err on the side of affirming some convictions in cases where

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[16] *Glasser* v. *United States*, 315 U.S. 60, 76 (1942).

[17] *U.S. ex rel. Cooper* v. *Denno*, 221 F.2d 626, 631 (2nd Cir. 1955) (Frank J., concurring).

prejudice may well have occurred. In light of the accepted rationale for the automatic new trial rule, the instant case presents a paradigm situation for its application: here there was ample opportunity for prejudice, but the Government's deliberate failure to keep records has made it difficult for the defendant to demonstrate specific prejudice.

Rejecting the decisions of two Circuits and this Court, however, the Second Circuit announced an *ad hoc* rule limiting an automatic new trial only to cases where the Government's actions have been "ruthless beyond justification", and have involved "intrusion of the grossest kind". (37a). But when the Government has engaged in an unconstitutional intrusion which is less than ruthless and gross, the Second Circuit held that a different rule will apply:

> "There is then no need to punish the prosecutor by freeing the defendant. The matter must then proceed to an ultimate adjudication of whether the defendant was *prejudiced in fact*". (37a) (emphasis added).

There is no justification for such a sliding scale approach. It gives no guidance to government lawyers as to when an unconstitutional intrusion becomes a ruthless and gross one. The right to counsel—and to the confidentiality of legal conferences—is absolute and is not subject to diminution by degrees.

In any event, the intrusion at issue here was extremely serious. The Second Circuit acknowledged that "DeStefano was present at numerous meetings where Rosner and his lawyers discussed various aspects of the Rosner case" (21a) and that he was subsequently debriefed by government lawyers. It concluded that "the Government should have told DeStefano not to go near the legal conferences of the defense", (32a) at least after the debriefing, and it sug-

gested that "this be done in the future". (32a). But it attempted to diminish the seriousness of this intrusion by observing that DeStefano and Lamattina had not been deliberately "planted" by the Government to discover "defense secrets". (36a), and therefore that they "were not intruding agents of the Government [and] there was no constitutional restraint on their ultimately divulging what they learned" from their attendance at the Rosner legal strategy sessions.

This very argument, however, was explicitly rejected by this Court in *Hoffa* v. *United States*, 385 U.S. 294 (1966). In that case the Government argued that Partin was not a government informer at the time he overheard the conversations there at issue, relying on a specific finding of fact by the district court that "the government did not place this witness Mr. Partin in the defendant's midst or have anything to do with placing him in their midst, rather that he was knowingly and voluntarily placed in their midst by one of the defendants", *Id.* at 299. But this Court, while accepting these findings, deemed them irrelevant to whether Partin was a government agent for purposes of the Sixth Amendment. The Court refused to be diverted by what it characterized as a "verbal controversy", *Id.* at 295; instead it explicitly accepted the defendant's premise that Partin was a government agent "from the time he first arrived in Nashville. . . ." *Id.* at 299.

In light of this Court's decision in the *Hoffa* case, it is clear that for purposes of the Sixth Amendment, DeStefano and Lamattina must be regarded as government agents from the day they agreed—in exchange for their freedom—to withhold important information from their alleged co-conspirator Rosner; and the day they agreed to consider the government's open-ended offer to exchange information about the Rosner case for something in return. At the

very least, the Government lawyers were certainly under an obligation to caution DeStefano and Lamattina against attending meetings between Rosner and his lawyers and participating in discussions concerning Rosner's legal strategy. That obligation existed without regard to whether the government lawyers regarded DeStefano and Lamattina, at that point, as "informers", "potential informers" or "potentially cooperating witnesses".

The very latest point at which DeStefano and Lamattina could be deemed to have become government informants or agents, for purposes of the Sixth Amendment, is in June of 1972, when they began to attend Rosner defense meetings under false pretenses, i.e. without disclosing their true relationship with the Government. There can be no doubt that DeStefano and Lamattina would not have been permitted to attend these meetings and overhear discussions of legal strategy if Rosner and his attorneys knew of their ongoing relationship with and offer from the Government.

The fact that DeStefano and Lamattina had not—at that point—definitely decided whether they would give the government the requested information about the Rosner case is irrelevant. The Government had already solicited the information and had prevailed upon DeStefano and Lamattina to keep open minds about it. The fact that they did not make a final decision to turn over this information until later does not mean that they were not government agents when they obtained the information—as long as they obtained it after being requested to cooperate by the Government. Any other conclusion would create an opportunity for considerable abuse: the Government could always ask each "potentially cooperating individual" to keep an open mind; to go out and gather information; but to hold-off the final decision to exchange the information

for something in return until *after* the information was secured. In that way the Government could insulate itself from responsibility for the improper actions of those who it solicits to obtain information. The most sensible way to prevent this kind of abuse is to regard an individual as an agent of the government for purposes of the Sixth Amendment *at the time when the Government solicits his cooperation,* without regard to whether he accepts the offer then or later. The only obligation this would impose on the Government is to caution all potential cooperating individuals not to attend counsel meetings or participate in legal strategy sessions with co-defendants at the time the offer is extended.[18]

The conflict generated by this case is an important one requiring resolution by this Court. Government lawyers frequently must deal with potential informers or cooperating witnesses in multi-defendant situations. At present they have no authoritative guidance as to the limits imposed by the Sixth Amendment on such dealings. And such guidance is sorely needed, as evidenced by the frequency of cases in which this issue has arisen and in which the courts have criticized government lawyers for conduct "beneath the high standards of professional conduct. . . ." [19] Despite these admonitions, the problem continues, because govern-

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[18] To demonstrate the absurdity of any other conclusion, consider a hypothetical case in which an open-ended offer (like that made here) was made; the alleged informers then attended a legal strategy meeting between the defendant and his lawyer, equipped with a hidden recording device; and subsequently they decided to accept the offer and to provide the Government with the recording, which the Government used extensively in preparing for the trial. Could there be any doubt, under those circumstances, that the persons making the recording would be regarded as Government agents at the time they made the recording?

[19] See *e.g. United States* v. *Mosca,* 475 F.2d 1052, 1061 (2nd Cir. 1973); *United States* v. *Zarzour,* 432 F.2d 1, 3 (5th Cir. 1970); *United States* v. *Rispo,* 460 F.2d 965, 978 (3rd Cir. 1972).

ment lawyers have never been given authoritative guidance as what they must do when they commence the process of developing a "cooperating individual" from among a number of co-defendants charged with a crime. A sensible rule —and one that gives due recognition to the real problem faced by the government in developing informants—would be the following: when the government requests a suspected criminal to become a "cooperating individual" in a particular case, it should—at the time it makes its request—admonish the person not to attend legal strategy sessions held by other defendants and their lawyers involving that case. There may, of course, be circumstances under which such an admonition could not be realistically given—for example, where the potential cooperating witness' sudden disappearance from strategy sessions would arouse suspicion that he was cooperating with the government in a situation in which secrecy was legitimately essential. In such cases, the government may choose to allow the potential cooperating witness to attend counsel meetings, but it should not then debrief him about the case following his attendance at such meetings. At the very least, if such a debriefing is permitted, it should be recorded or transcribed, so that defense counsel might—at the appropriate time—comb the record in order to determine whether prejudice occurred, *i.e.*, whether any information learned at the strategy sessions was directly or indirectly communicated to government lawyers. Absent these elements, a new trial must be ordered.

This rule would not in any way hamper the government in the legitimate conduct of its investigatory work. It would simply preclude the government from gaining unfair advantage from its failure properly to caution those whose cooperation it is actively seeking, and from its failure to keep records of its debriefing sessions with such persons

after they have become cooperating individuals. It is a rule that gives due both to the need for effective law enforcement and to the need to enforce the constitutional right of private communication between a criminal defendant and his attorney.

There can be no dispute that under such a rule appellant Rosner must be given a new trial. The record reveals no admonitions by government lawyers when they sought the cooperation of DeStefano and Lamattina in the Rosner case. Nor is there any dispute that DeStefano and Lamattina did attend legal strategy sessions and were subsequently debriefed by government lawyers about the Rosner case. It is also conceded that the government made no written record—contemporaneous or subsequent—of the debriefing sessions.

Finally, even if this Court were to require a showing of actual prejudice, it is petitioner Rosner's contention that such a showing has been made. Consider, for example, the *Reardon* situation. The government acknowledges that it "had no information about the Reardon case" until DeStefano brought it up and reminded Lamattina about it. DeStefano testified that he had discussed the *Reardon* situation with Rosner. Although he was not able to remember when or where it was first discussed, he would not rule out the possibility that it was on the day it was publicly revealed that Lamattina had decided to cooperate with the government.

Assistant U.S. Attorney Scopetta acknowledged that only four days *after* this meeting, the following occurred at the debriefing session:

> "DeStefano said there had been a prior case. We brought Lamattina into the room and said, 'Was there a prior case?' and Lamattina said, 'What case?' or

something to that effect. And DeStefano said, *'What about Reardon?'* "

Lamattina then told the government lawyers the whole story of the Reardon situation, a story he had apparently forgotten and had to be reminded of by DeStefano. If DeStefano, in fact, learned of it while attending a meeting between Rosner and his lawyer, then Rosner was surely prejudiced. Rosner, in telling his lawyer about this potentially incriminating episode was obviously communicating an extremely confidential matter, expecting that it would not be divulged to government lawyers. Nor did the matter end there. It is acknowledged by the government, and established by the record that the Reardon situation, of which the government had no knowledge before DeStefano brought it up, was used extensively by the government on cross-examination. (See Transcript pp. 1001-1006).

Another opportunity for prejudice is inherent in the fact that DeStefano and Lamattina had undertaken to "conduct the major portion of the investigation of Leuci. . . ." (451, 339, 217, 330). Had Rosner known of DeStefano's and Lamattina's prior agreements with the government he plainly would not have relied on their carrying on the investigations with diligence. Although Rosner did carry on some investigations of his own, the fact that he did not come up with three impeaching witnesses until after the trial, suggests that he was prejudiced by his reliance on the investigative work of persons who—to say the least—were serving two masters simultaneously. This is surely a situation pregnant with the opportunity for prejudice, though specific prejudice is, of course, difficult to demonstrate. It is an area where, as the court put it in *Rispo,* "the probability of unfairness due to the government's misconduct is incapable of realistic delineation". 460 F2d at 976.

II

Petitioner Rosner was entrapped into committing the crimes at issue and was denied the proper instructions on entrapment.

In *United States* v. *Russell*, 411 U.S. 423 (1973), this Court held that the defense of entrapment is established "only when the Government's deception actually implants the criminal design in the mind of the defendant . . ." *Id.* at 436. It refused to apply that defense in a case where the defendant "himself planned to commit a crime" even before the government agent provided the opportunity, and where the crime at issue was "not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise"; and where the "item" supplied by the government agent "could have been obtained without the intervention of" the agent.

The government does not contend that petitioner in this case had any *prior* plan to attempt to secure the secret documents by corrupt means; it concedes—as it must—that the entire idea of a corrupt contact willing to supply the documents for a price came from its agent Robert Leuci. It does not contend—nor could it—that petitioner would have committed the alleged crime were it not for the actions of its agents. This is a paradigmatic instance of a situation where "the Government's deception actually implants the criminal design in the mind of the defendant . . ." *United States* v. *Russell* at 436. This is also a clear instance where the "items" supplied by the government agent—namely the improperly secured documents—were absolutely "indispensable" to the commission of the crime and could not have "been obtained without the intervention" of the government agent.

Moreover, the government's action in this case was so unconscionable as to violate due process: with one hand, it indicted an attorney on charges that it could not sustain (and of which the petitioner, who has always asserted his complete innocence, must be presumed innocent); and with the other hand, it sent out an agent who offered him a means of escaping those very charges. This situation is parallel to the one—which all would condemn as a clear entrapment—where a police officer arrests someone and then offers to release him in return for a bribe. It is one thing to provide an opportunity for corruption to those who are in the *business* of buying or selling justice *for a profit;* it is quite another thing to play on the weakness of a defendant who believes himself innocent of a crime and to offer him an illegal way of avoiding shame, imprisonment and disbarment. Unless the entrapment issue in this case is reviewed, the limits on government deception laid down in *Russell* will become meaningless and the entrapment defense will be rendered nugatory.

The case also raises a narrower, but equally important, issue relating to the proper instruction in a case where the defendant's evidence has raised a "course-of-conduct" entrapment defense. Petitioner Rosner requested the following instruction, which the trial court refused to give:

> "The defendant asserts that he was entrapped when he obtained the 3500 material and the grand jury minutes. I charge you that although the grand jury minutes were obtained several days after the 3500 material, a separate independent inducement need not be shown as to the grand jury minutes, where their acquisition 'was part of a course of conduct which was the product of the initial inducement.'"

The requested charge indisputably reflects the correct view of the law. The interior quotation in the request comes

from this Court's decision in *Sherman* v. *United States*, 356 U.S. 369, 374 (1958), which this Court recently reaffirmed in *Russell*. In *Sherman*, an informant induced a reluctant acquaintance to sell narcotics to him. Afterwards the defendant made numerous sales to the informant, three of which were witnessed by an undercover agent. So far as appears, none of the subsequent sales were accompanied by signs of reluctance. The Court held that the defendant had been entrapped as a matter of law, stating that:

> "It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." 356 U.S. at 374.[19]

The failure to give the requested charge was highly prejudicial. The jury may have believed that Rosner was initially entrapped, but that he later became a willing participant in the scheme. According to the agent's testimony, DeStefano reported at the October 1 meeting that Rosner had refused to attend and that Rosner did not want to get involved because he believed he had the Hernandez case beat. Trial Transcript at 200. Rosner testified that he had refused to come to the October 1 meeting because he did not want to have anything to do with the scheme, and that he agreed to come to the October 4 meeting only because DeStefano frightened him by saying that he was under investigation for other crimes, including murder of a witness in the Hernandez case. Trial Transcript at 820-21, 833-35. At the October 4th meeting, according to Ros-

[19] See also *United States* v. *Curry*, 284 F.Supp. 458, 463-64 (N.D. Ill. 1968) (several drug sales over a period of two months by non-addicted defendant could be part of same course of conduct induced by informant); *United States* v. *Buie*, 407 F.2d 905 (2nd Cir. 1969) (dictum), aff'd on other grounds, 396 U.S. 87.

ner's testimony, Leuci confirmed DeStefano's statement that Rosner was under investigation for murder and other crimes, and Rosner reluctantly decided to find out what he would do about the charges against him. *Id.* 850-55.[21] That these spurious and frightening allegations were imparted to Rosner by Leuci was confirmed by transcripts and tape recordings of their meeting on October 13 which were received in evidence during the trial.

Leuci testified that by October 13, Rosner was pressing for copies of grand jury minutes and that Leuci was the one who was dragging his feet. *Id.* 302-03. On the basis of this evidence, the jury could have concluded that after Rosner's initial reluctance was overcome, he became ready and willing to receive further material, but that the negotiations for the grand jury minutes were part of a course of conduct which was the product of the original inducement.

The jury's verdict strongly suggests that the omission of the requested charge was prejudicial. The jury acquitted Rosner of two charges relating to his early contacts with the agent, but convicted him of charges relating to later dealings.[22] The acquittals must have been based

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[21] It is hornbook law that in determining whether it was error to refuse to grant on instruction, the evidence must be considered in the light most favorable to the defendant, and if a defendant's testimony raises a defense, he is entitled to an instruction about that defense, even if the Court believes this testimony was not credible. See 2 Wright, Federal Practice and Procedure §482 n. 20; *United States* v. *Terrell*, 474 F.2d 872, 876 (2nd Cir. 1973); *Smith* v. *United States*, 381 F.2d 784, 790-791 (D.C. Cir. 1964).

[22] In Counts 4 and 5, Rosner was charged with participating in corrupt payments of money to the agent on October 4 and October 8. These payments occurred prior to Rosner's request for the grand jury minutes, but subsequent to his request for the 3500 materials. Tr. 213, 285-93. The jury acquitted Rosner of Counts 4 and 5, but convicted him of Counts 6, 7 and 8, which alleged unlawful payments to the agent on October 12, 13 and 19 respectively.

on the jury's belief that Rosner had been entrapped on the earlier occasions. The jury was clearly concerned about the entrapment defense; after 4½ hours of deliberation it requested a further charge on the definition of entrapment. *Id.* 1437. A charge informing the jury that Rosner could be acquitted if his willingness to participate in purchasing the grand jury minutes could be traced to the influence of the earlier entrapment might well have resulted in his acquittal on all counts.

III

Petitioner Rosner was denied his right under the Sixth Amendment and the Federal Rules of Criminal Procedure to subpoena essential records; moreover, there is a direct conflict between the lower court decision and a recent decision of the Fifth Circuit.

During the trial, and again at a post trial hearing, petitioner sought to subpoena various complaint and disciplinary records of the Government's main witness—undercover agent Robert Leuci—in the possession of state and federal agencies. Their production was sought under "constitutional subpoena power and pursuant to Rule 17." Rosner's attorney agreed to be bound by an order "that this material may not be disclosed outside the processes of this court." The importance of these records to petitioner's defense cannot be understated. The entire case rested on Leuci's credibility[23] and Leuci had sworn that he had not himself been involved in corrupt narcotics activities between 1967 and the time of trial. Rosner's lawyer had received information—which has now been substantially confirmed and which the government has refused to deny—that Leuci had been involved in extensive nar-

[23] The tapes were ambiguous at various critical points, and there were no tapes at all for some of the meetings.

cotics violations and shakedowns since 1967, and that a tape recording detailing Leuci's criminal record, which had admittedly been in the possession of the United States Government, had been deliberately destroyed. In an effort to establish these allegations, and to impeach Leuci's credibility, petitioner sought the production of Leuci's complaint and disciplinary files. The trial court quashed the subpoena, although on subsequent examination he found that there "were a number of things [in them] that [petitioner's lawyer] might have found very interesting." He rested his decision on the ground that the files did not indicate that Leuci had *actually been disciplined* as a result of any of the various complaints.

Such a limitation on the right to subpoena records undercuts the Sixth Amendment and makes little sense. To make a defendant's rights depend on whether the police department has *actually imposed discipline* on one of its members, is to make the right to subpoena such records meaningless. It is universally recognized that the police department is often reluctant to impose disciplinary sanctions on its own even in cases where discipline is plainly warranted. See, e.g., *Mapp* v. *Ohio,* 367 U.S. 643 (1961).[24] Surely, it is possible—and that is all a defendant need show in the context of a constitutional exercise of the subpoena power—that the records could contain evidence of wrongdoing that, for one reason or another, did not result in discipline; but which could be put to proper and important use by a defense lawyer.[25]

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[24] This is not intended as a criticism of the Police Department, but merely as a recognition that many factors other than proved guilt go into the complex decision whether the Department should discipline one of its members. These factors might include police morals, extenuating circumstances—and in some cases even the recognition that the imposition of discipline on a policeman might endanger pending prosecutions in which he is to be a witness.

[25] In limiting disclosure to instances of actual discipline, the lower court was obviously confusing the standard for *questions*

The decision of the lower court, sustaining this limitation on the right to subpoena relevant documents is in direct conflict with the recent decision of the Fifth Circuit in *United States* v. *Deutsch*, 475 F.2d 55 (1973). In that case the defendant "moved for the production of (the Government witness') personnel file." The Court of Appeals reversed the trial court's refusal to order its production, holding—in direct conflict with the lower court here—that the "burden is on the government to produce, not on the defendant," and that if there is any burden on the defendant it is merely "of suggesting a possibility of favorable evidence." The *Deutsch* court also held that "of course, the Brady rule requires the government to supply evidence useful to the defendant simply for impeachment purposes." *Id.* at 57. This Court should resolve this important conflict and give guidance to the lower courts concerning the proper limits on the subpoena power.

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that might be asked on cross-examination, with the standard *for information that might be useful to a defense lawyer in providing leads for further investigation which in turn might produce information that would be used on cross-examination.* Assuming arguendo that the lower court was correct in its conclusion that bare allegations of wrong-doing that did not lead to discipline may not —by themselves—form the basis for cross-examination questions, certainly that is not the relevant issue. The issue is whether the subpoenaed material might form "a basis for further investigation". See cases cited in A.B.A.; Discovery and Procedure Before Trial at p. 77. It is clear that such material is producible. As this Court said in *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967): "There can be little doubt that the defense might have made effective use of the report at trial *or in obtaining further evidence.*" (Emphasis added) There can be no doubt that a complaint file *—which admittedly did contain specific accusations of wrongdoing against Detective Leuci*—(see Transcript of Jan. 26, 1973 at p. 9)—would have provided leads for further investigation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to grant the petition for certiorari.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Cr. 782

UNITED STATES OF AMERICA

—against—

EDMUND ROSNER, *et al.*,

Defendant.

BAUMAN, *D. J.*

Before the court is defendant Rosner's second motion for a new trial based on newly discovered evidence pursuant to F.R.Cr.P. Rule 33.[1] After the trial of this case, testimony was given in another which led to the revelation that Messrs. DeStefano and Lamattina, Rosner's co-defendants, had acted as government informers before this indictment was returned.[2] Rosner argues that their activities,

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[1] The first motion for a new trial alleged that the chief government witness, Detective Robert Leuci, had committed perjury by failing to admit involvement in extensive narcotics trafficking. After a one day hearing at which the defendant presented three witnesses and offered another, I denied this motion from the bench.

[2] DeStefano's activities came to light in the following way. On January 15, 1973, the trial of *United States* v. *Archer, Klein and Wasserberger*, 72 Cr. 849, commenced before Judge Tenney of this court. Testimony at that trial disclosed that on April 19, 1972 DeStefano had introduced Sante Bario, an undercover agent, to one Leon Wasserberger, a bail bondsman and one of the defendants named in the indictment in which that investigation culminated. Mr. Bario further testified that DeStefano knew that he was acting in an undercover capacity.

and the government's failure to disclose them, violate his rights secured by the Fifth and Sixth Amendments.

A hearing was held on this motion at which DeStefano, Lamattina, past and present members of the U.S. Attorney's Office who had participated in this prosecution, and several defense lawyers testified. The extent of DeStefano's and Lamattina's cooperation with the government was carefully probed by the defense, and the picture of their activities that emerged from their testimony was corroborated by the government lawyers and largely uncontested by the defense. It may be fairly said that the conflict here does not concern the verity of the evidence presented, but rather its legal significance.

The events that formed the subject of this indictment took place in September and October, 1971. On December 20, 1971, while Detective Leuci was meeting with DeStefano and Lamattina at a Brooklyn restaurant, they discovered his status as an undercover agent, a possibility they had well suspected. They were immediately taken into custody and brought to the United States Attorney's Office, where they met with Assistant U.S. Attorneys Edward Shaw and Nicholas Scoppetta. Although the facts of the *Rosner* case (as 72 Cr. 782 shall be denominated hereafter) were not discussed extensively, DeStefano and Lamattina were informed of the general nature of the evidence against them and were asked to cooperate with the government. They asked for time to consider this proposal, and said that they would not reveal Leuci's activities or the fact of the meeting. From the outset both steadfastly refused to consider involving Rosner in any way.

Between December 20, 1971 and July 5, 1972, when the Rosner indictment was returned, Shaw and Scoppetta met DeStefano and Lamattina very frequently; Scoppetta esti-

mated that there were perhaps 30 such meetings. Most of them were devoted to efforts by the prosecutors to induce them to cooperate with various investigations into corruption in the criminal justice system in New York City. DeStefano and Lamattina were generally resistant to cooperating, and the prosecutors testified that they obtained little useful information from these conversations. DeStefano aided the government on one occasion only: on April 19, he introduced Bario to Wasserberger, in a totally unrelated case. He did not cooperate in any respect between April 19 and July 5. Lamattina cooperated with the government on two occasions in May or June: one project was successful, the other apparently aborted. Although the government attempted to elicit information from the two men concerning the Rosner case, neither indicated the slightest willingness to cooperate in that matter.[3]

After the return of the indictment, neither DeStefano nor Lamattina met with any government representative until early in November, when DeStefano met Scoppetta and Richard Ben-Veniste, another Assistant U. S. Attorney. Scoppetta asked DeStefano whether he still intended to go to trial and again urged him to cooperate. DeStefano refused, and persisted in his unwillingness to discuss any aspect of the Rosner case, in which he considered himself a defendant.

Several meetings took place between the two men and members of the U.S. Attorney's Office during the week preceding the commencement of the trial on November 20, 1972. DeStefano and Lamattina met with Messrs. Morvillo

[3] Shaw testified (Tr., p. 118) that "there was never occasion, any occasion, on which either DeStefano or Lamattina told me one single fact about the Rosner case."

and Sagor on November 16, November 18 and November 19; at the meeting of the 18th, Lamattina agreed to plead guilty and cooperate with the government thereafter. De Stefano remained steadfast in his refusal to cooperate through the meeting of the 19th.

Lamattina entered a guilty plea on the morning of the 20th, and DeStefano did likewise on the 21st, after the jury had been selected. Subsequent to their guilty pleas both men engaged in extensive conversations with members of the U. S. Attorney's Office on November 22 and 24. The latter meeting lasted close to five hours, and the two were interrogated concerning several aspects of the Rosner case. Specifically, they were asked about Rosner's alleged receipt of the Marcone indictment on October 8, 1971; the source of Rosner's bribe money; and the Reardon case, a matter in the state courts in which the government suspected that Rosner had bribed Lamattina. The government subsequently cross-examined Rosner at trial on all of these matters. Lamattina and DeStefano were also questioned generally about the accuracy of the charges set forth in the indictment. Neither claimed any factual error in the indictment. Lamattina said that Rosner had in fact taken the Marcone indictment with him (to which Leuci had testified at trial two days earlier). So far as the Reardon matter, Lamattina told the prosecutors what he knew. Both De Stefano and Lamattina said that they did not know the source of the Rosner bribe money.

DeStefano did not communicate with any government lawyers between November 24 and December 5, the day of the jury verdict. Lamattina met Sagor once more, on November 25, at which time he was questioned again about the receipt of the Marcone indictment.

Appendix A

There was considerable testimony adduced at the hearing regarding DeStefano's presence at meetings where defense strategy was formulated. For example, the three defendants and their lawyers met at Gasner's Restaurant on June 30 after they testified before the grand jury which returned the indictment. Matters discussed at that meeting included the extent of Detective Leuci's criminal activities and the consequent possibilities of impeaching his credibility; the defense of entrapment; and the allocation of pretrial responsibilities among the defense attorneys. DeStefano continued to meet and speak with Rosner regularly thereafter, through the conclusion of the trial. Even after he pleaded guilty he phoned Rosner at home in the evenings during the course of the trial, and on November 27 he visited Rosner's office and discussed the case at length with Rosner and his lawyer.

There is nothing to suggest that either DeStefano or Lamattina ever told any government lawyer anything about defense strategy or the nature of defense preparation. Sagor and Morvillo both testified[4] that at the outset they had been prohibited from divulging anything of that kind and there is not one shred of evidence that either failed to comply with this instruction.

Rosner's principal argument here is that the presence of a government informer in the defense came during the preparation for trial violates his right to counsel secured by the Sixth Amendment. He in effect asks this court to follow *Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952), and *Caldwell* v. *United States,* 205 F.2d 879 (D.C. Cir. 1953), and hold that

[4] See testimony of Morvillo at p. 69, and of Sagor at p. 91. See also testimony of DeStefano at p. 313 et seq., and of Lamattina at p. 442 et seq.

any intrusion by the government into the defense preparation *ipso facto* invalidates a conviction. Although the *Coplon* and *Caldwell* cases were cited with apparent approval in *Hoffa* v. *United States,* 385 U.S. 293 (1966), the Court's observations there were dicta, and the *per se* rule which those cases set forth has not been followed in other circuits. Compare *United States* v. *Zarzour,* 432 F.2d 1 (5th Cir. 1970), with *United States* v. *Rispo,* 460 F.2d 965 (3d Cir. 1972).

Our Court of Appeals has now however, rejected precisely the *per se* rule for which the defendant argues. In *United States* v. *Mosca,* —— F.2d —— (2d Cir., March 5, 1973, slip opinion at p. 2073), a defendant continued to participate in conferences with his co-defendants after he had begun to cooperate with the government. There, as here, the government denied receiving any information from him regarding defense strategy. On appeal, the *Coplon* and *Caldwell* cases were invoked and the court responded as follows:

> "Thus, while we believe that such tactics are beneath the high standards of professional conduct expected of government counsel, we do not find such tactics to be so condemnable as to warrant automatic reversal. *Prejudice to appellants must be considered.* Finding none, we hold that no substantial right of appellants has been infringed." (Italics supplied.)

In the instant case, as in *Mosca,* there has been no showing whatsoever of prejudice to Rosner. As I have already indicated, DeStefano and Lamattina divulged nothing of the defense strategy to any government lawyer. There was consequently no government infringement of Rosner's

Sixth Amendment rights. Indeed, there is considerable question whether either man can be accurately labeled an informer from July 5 to November 20. Neither met regularly with any government representative, and both fully expected to stand trial on the instant indictment. There is not the slightest suggestion of cooperation with the government during this period. The only meetings, i.e. those of November 16, 18, and 19, were devoted to attempts by the government to induce cooperation and a guilty plea from the two. Such negotiations are altogether usual and proper. An adversary relationship was maintained between DeStefano and Lamattina on the one hand, and the government representatives on the other. These two were considered, and considered themselves, defendants, not informers.

It is true that DeStefano and Lamattina gave the government certain information about the facts of the Rosner case on the meetings of November 22 and 24, after they pleaded guilty. However, none of that information was obtained by them as a result of their participation in defense strategy meetings; it was rather the product of their participation in criminal activities.

Prosecutors not infrequently use information supplied them by cooperating defendants to fill out gaps in their knowledge or preparation. So long as the government lawyers were not made privy to Rosner's consultations with his lawyer or to the strategies evolved, I see no constitutional infirmity in the government's conduct.

There is an alternative ground for this motion, although it is not articulated in the defendant's brief.[5] As I understand it Rosner contends that the failure of the government

[5] Neither the motion papers nor defendant's brief specifies this ground. But it was strongly urged during the course of the hearing and I feel it should be decided here.

to bring to the attention of the court or the defense the existence and extent of DeStefano's prior cooperative activities constituted a deliberate governmental suppression of evidence. Our Court of Appeals has recently defined the burden of the defense in a Rule 33 motion where prosecutorial suppression has been established:

> "At least where the suppression is deliberate, the defendants need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial." *United States* v. *Mele*, 462 F.2d 918 at 924 (2d Cir. 1972).

See also *Giglio* v. *United States*, 405 U.S. 150 (1972); *United States* v. *Lusterino*, 450 F.2d 572 (2d Cir. 1971); *United States* v. *Tomaiolo*, 378 F.2d 26 (2d Cir. 1967).

Rosner's argument based on prosecutorial suppression would presumably run as follows. The theory of the defense presented at the trial was based not merely on entrapment, but entrapment of a special kind. Rosner claimed that he was entrapped both by Leuci, the undercover agent, and by his conduit DeStefano who, although participating in the conspiracy, helped induce Rosner to commit a crime in which he would not otherwise have participated. The jury might well have rejected this defense, the argument continues, because the entrapment of one co-defendant by another is inherently implausible. However, had the jury been aware of DeStefano's prior cooperation with the government this special entrapment theory would have gained credibility and might possibly have altered the jury's verdict.

I cannot accept this argument, and I cannot even find that it meets the relatively low standard set forth in *Mele*. In other words, I do not think that the revelation of

Appendix A

DeStefano's cooperation could possibly have affected the jury's verdict. I have reached this conclusion for several reasons. First and most importantly, DeStefano was not an informer, nor had he been approached about informing, during the period of the conspiracy, i.e. September and October, 1971. His first contact with any government representative was that of December 20th. Secondly, after carefully observing DeStefano's demeanor during the hearing and Rosner's at trial, I conclude that no reasonable man could have believed that DeStefano was capable of entrapping anyone as shrewd, resourceful and legally aware in criminal cases as Rosner. Had the defense called DeStefano as a witness at the trial in an effort to substantiate its entrapment theory, the inevitable conclusion would have been that DeStefano played Trilby to Rosner's Svengali.[6] Thirdly, the evidence of Rosner's active participation in the events set forth in the indictment was overwhelming. Leuci's testimony was clearly truthful and it was completely corroborated by the irrefutable evidence of the tape recordings. Rosner's on the other hand, was, to put it kindly utterly incredible.

In short, had this evidence been available to the jurors, they would have merely learned more about a dull witted and rather easily manipulated accessory to these crimes, one whose diminished moral sensitivity caused his partnership in a vicious criminal enterprise. The jurors would have learned moreover that throughout his conversations with government lawyers, DeStefano had remained totally loyal to Rosner to the end, and had steadfastly refused

[6] At the hearing, Mrs. Rosner noted, in regard to DeStefano's suitability as a witness: "I thought he would be a hindrance rather than an asset to anyone's case." (Tr., p. 353). She made the remark in a different context, concededly, but I deem it an acute analysis of DeStefano's credibility.

to involve him. This disclosure would have utterly devastated the puny entrapment defense which they properly rejected.

For all the reasons stated above, Rosner's second motion for a new trial must be, and hereby is, denied. The defendant is ordered to appear for sentence at 9:30 A.M. on March 20, 1973.

IT IS SO ORDERED.

s/ ARNOLD BAUMAN
U. S. D. J.

Dated: March 15, 1973

Appendix B

Opinion of Circuit Court for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1057—September Term, 1972.

(Argued July 18, 1973 Decided September 26, 1973.)

Docket No. 73-1511

UNITED STATES OF AMERICA,

Appellee,

—against—

EDMUND ROSNER,

Defendant-Appellant.

Before:

MOORE, OAKES, *Circuit Judges*
and GURFEIN,* *District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Arnold Bauman, *Judge,* convicting the defendant after a jury trial of conspiracy, 18 U.S.C. § 371, obstruction of justice, 18 U.S.C. §§ 1503 and 2, and bribery 18 U.S.C. §§ 201(b) and 2, and 3237.

Conviction affirmed. Sentence vacated and remanded for resentencing.

* Of the United States District Court for the Southern District of New York, sitting by designation.

ALAN DERSHOWITZ, Cambridge, Mass., *for Appellant.*

ELLIOT G. SAGOR, KENNETH R. FEINBERG, JOHN D. GORDAN, III, JOHN W. NIELDS, Assistant United States Attorneys, of Counsel (Paul J. Curran, United States Attorney, Southern District of New York), *for Appellee.*

PAUL G. CHEVIGNY, EDWIN J. OPPENHEIMER, of Counsel (American Civil Liberties Union), *as amicus curiae.*

GURFEIN, *District Judge:*

This is an appeal from a conviction of Edmund A. Rosner, a practicing lawyer, of the crimes of conspiracy, 18 U.S.C. § 371, obstruction of justice, 18 U.S.C. §§ 1503 and 2, and of three counts of bribery, 18 U.S.C. §§ 201(b) and 2, and 3237. The indictment was filed on July 5, 1972, naming appellant and Nicholas DeStefano, a private investigator, and Nicholas Lamattina, a New York City policeman as co-defendants. Each of the co-defendants pleaded guilty in circumstances to be related. Neither testified in Rosner's trial which began on November 20, 1972 and ended on December 5, 1972. Judge Bauman sentenced appellant on March 20, 1973 to imprisonment for five years on each count to run concurrently. The basic issue raised is whether appellant was entrapped as a matter of law and whether, alternatively, the trial judge erred in his charge on entrapment. Rosner made two motions for a new trial on the basis of newly discovered evidence.[1] The second motion, which was denied after an evidentiary hearing, raised the claim of governmental violation of appellant's Sixth

1 The denial of the first motion is irrelevant to this appeal.

Amendment right to privacy of communication with his counsel.

I.

The Evidence at the Trial.

We must view the evidence in the light most favorable to the Government after a conviction, see *United States* v. *Smalls*, 363 F.2d 417 (2 Cir. 1966), *cert. denied*, 385 U.S. 1027 (1967).

(a) *The Rosner Subornation of Perjury Case (Rosner I).*

In August 1971 Rosner was under indictment (70 Cir. 1030, hereinafter *"Rosner I"*), with DeStefano and two co-defendants on charges of suborning perjury and procuring false alibi testimony from one Pedro Hernandez and three others at a Federal narcotics trial that had been held in March 1967. The *Rosner I* indictment was ultimately dismissed on January 24, 1972 for failure of the Government to prosecute, due to the disappearance of its chief witness, Hernandez. The crimes here charged took place while the *Rosner I* indictment was still pending.[2]

(b) *The Martinez-Marcone Situation.*

In August 1971 the Grand Jury was also investigating the dismissal in February 1970 of a narcotics case against Felix Martinez in Queens Supreme Court. Targets included Dominick Marcone, a bail bondsman, the arresting police officers, and their associates. Detective Robert

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2 Judge Metzner ordered dismissal on January 24, 1972, thirteen months after the indictment had been filed. The Government's appeal was dismissed for lack of jurisdiction and the petition for mandamus was denied by this Court in *United States* v. *Di Stefano* [sic], 464 F.2d 845 (2 Cir. 1972).

Leuci of the New York Police Department was asked by the United States Attorney's office to investigate the *Martinez* matter in an undercover capacity.[3] Leuci agreed to hold himself out as a corruptible policeman.

(c) *The Events that Followed.*

On September 28, 1971 Leuci called co-defendant Lamattina, also a police detective, to arrange a meeting. Leuci knew that Lamattina had been connected with the Martinez case. On September 30 Leuci, wired with a recording device, met Lamattina and represented that he had a "contact" in the United States Attorney's office. His "contact" was, in fact, Special Assistant United States Attorney Scoppetta, Leuci's supervisor in the undercover investigation. Divulging to Lamattina that his "contact" was active in the Marcone situation under federal investigation, Lamattina, in turn, told Leuci that it was DeStefano who had "asked me to get in touch with the detectives who made the arrest in the case," and that the detectives had told Lamattina that for $25,000 they would see to it that Martinez went free.[4] Lamattina arranged, at his own suggestion, for Leuci to meet with DeStefano and Marcone. At this meeting, there was a brief discussion of Marcone's case, during which Leuci revealed information purportedly relayed to him by his "contact." As Marcone left, he asked DeStefano to "get whatever you can get." Lamattina and DeStefano went into a "semi-huddle;" Leuci overheard DeStefano say

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3 Detective Leuci had in February 1971 been in working contact with Commissioner of Investigations Nicholas Scoppetta while the latter was employed as an attorney for the Knapp Commission. Mr. Scoppetta was appointed Special Assistant United States Attorney in June 1971 and was involved in the *Marcone* investigation. It was Scoppetta who approached Leuci in August 1971.

4 Martinez was never prosecuted.

"[t]hat Rosner thing is important to me, too." Talk shifted from the next meeting place to *Marcone* and from *Marcone* to drugs, before DeStefano said, "You know, you can help me with something else, something else I am interested in." Leuci replied that he knew that DeStefano meant "The Rosner situation." And DeStefano affirmed "Yes, that's right." DeStefano asked Leuci to approach his "contact" about the matter immediately, and said that a meeting would be arranged for the next day. When DeStefano told Leuci he would like to bring Rosner along, Leuci balked, telling DeStefano "I didn't think that [bringing Rosner] was such a good idea and I wasn't so crazy about Rosner. I said I didn't know him but from things I had heard about him I wasn't so crazy about the idea of him [DeStefano] bringing him [Rosner]." DeStefano reassured Leuci that Rosner was "a thousand per cent guy." A meeting was set for October 1, 1971.

Rosner did not attend the meeting on October 1. Instead Leuci again met with Lamattina and DeStefano. The *Marcone* case was discussed, and DeStefano told Leuci that Rosner had declined the invitation to attend the meeting because "he felt that he had the case beat" but that Rosner would be in touch "if the need ever arised" [sic]. Leuci did not press to meet Rosner, but replied "it's fine." Another meeting was arranged for October 4.

On October 4, Leuci met Lamattina and they entered a coffee shop, where Rosner and DeStefano were seated at a table. Leuci was frisked for a listening device which he was not wearing. Rosner asked Leuci about the *Marcone* case. After some discussion of the *Marcone* case, Rosner asked Leuci "Can your friend help us in our case?" Leuci said "I think he can. You ask me what you want and I will put it to my friend." Rosner said he wanted 3500 material. Rosner told Leuci that he understood that there were four witnesses in the case and that "two are good and two are

bad," and that he "would like to find out what two are good and what two aren't good."

Leuci told Rosner that although his contact had not yet established a price for the information Rosner wanted, Leuci "would appreciate it if something were done" for his "contact" in the United States Attorney's office, "as soon as possible." Rosner and DeStefano stepped away from the table and Leuci saw Rosner pass DeStefano some money. When they returned to the table DeStefano passed Leuci $400 under the table. Rosner turned the conversation back to the *Marcone* investigation and then went to pay the check. DeStefano and Lamattina approached Leuci separately and counselled Leuci that if he wanted to get more money he would have to "put Rosner in deeper." Outside the restaurant Rosner told Leuci that if his "contact" could get what he had asked for "there would be a lot more for him [the 'contact'] in the future."

On October 6, Leuci, DeStefano and Lamattina met again. DeStefano told Leuci that Rosner harbored suspicions that Leuci might be working for the Government because of newspaper revelations about the *Marcone* investigation. DeStefano warned Leuci that if he were an undercover agent "This world is not a big enough place for you to hide in." There was some discussion of the amount Leuci wanted for his "contact" and whether Leuci could obtain a copy of the *Marcone* indictment as well as information on *Rosner I*. DeStefano told Leuci that Rosner should be told that the asking price for both was $5,000. Thus, Rosner would pay $2,500, thinking that was half, but since DeStefano would actually pay only $1,000, Leuci and his "contact" would actually gross $3,500.

On October 8, 1971 Leuci met DeStefano, and Leuci told him that he had photocopies of the 3500 material in *Rosner I* and a draft copy of the *Marcone* indictment. DeStefano said he would call Rosner, and DeStefano gave Leuci $100

"for you and your friend." After Lamattina's arrival, Leuci showed DeStefano, in Lamattina's presence, a draft copy of the *Marcone* indictment and the statements of three witnesses. When Rosner appeared, DeStefano stood up and the two walked to the back of the restaurant. They returned and sat down. Rosner said "Everything is going to be all right." DeStefano explained to Leuci that Rosner meant that Leuci would get his money but not that night. When Leuci pressed the matter, Rosner promised he would get Leuci the money after the holiday weekend, but that he would give the money to DeStefano who would give it to Leuci.

After reading the 3500 statements at a nearby table Rosner stated, "No figure has been quoted to me . . . you will get $2,500." DeStefano and Rosner asked questions about a "list of witnesses" and whether they could get more statements. The meeting ended with Rosner asking "to study the *Marcone* indictment over the weekend." Leuci gave it to him.[5]

On October 12 Leuci, this time wearing recording equipment, met with DeStefano. DeStefano asked Leuci for the Grand Jury minutes in the *Rosner I* case. Leuci said that would cost extra. Leuci told DeStefano to charge Rosner $2,000 and to keep half himself. They haggled and agreed upon $1,500. Saying that the money came from Rosner, DeStefano gave Leuci money which Leuci had been promised on October 8. DeStefano withheld some, and gave Leuci $1,150 in a cigarette package. A meeting was arranged for the next day.

On the evening of October 13, Leuci approached the Royal Pub Restaurant wearing his recording equipment. Before

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5 The Government does not contend that Rosner paid money for this opportunity to look at the indictment. The bribe payments are alleged only in connection with 3500 material and Grand Jury testimony.

Rosner's arrival, DeStefano asked whether Leuci knew if one George Stewart was cooperating with the Government. Leuci said he would try to find out. Rosner then appeared, and they discussed getting the Grand Jury testimony. Leuci repeated that it would cost an additional $1,500 and Rosner said "It is worth it" despite Leuci's remonstrance that it was not. Rosner insisted that the minutes be obtained by Friday. Leuci saw Rosner remove a sum of money from his pocket and give it to DeStefano. DeStefano and Leuci then walked to the bathroom where DeStefano passed Leuci $850.

Out of Rosner's presence, Leuci asked DeStefano to guarantee that Stewart would not be killed if Leuci gave DeStefano the information about Stewart's status and whereabouts. DeStefano refused, saying Stewart was "a bad guy" who was "going to hurt a lot of people."

On October 15, Leuci met Rosner and DeStefano at the Dayton Cafeteria.[6] Leuci reported that he would have the Grand Jury minutes in a few days but that he was unable to get any information on Stewart. Rosner agreed to the delay in getting the minutes, and asked Leuci whether there were any witness' statements which Leuci had not given to Rosner. Leuci assured Rosner there were none. Rosner then asked Leuci for the "yellow sheet" on one of the three witnesses whose statements Rosner had seen. Rosner, who had represented Stewart, gave Leuci some background information on Stewart, saying he was sure there was a file on Stewart, and asked Leuci's "contact" to "peek again" at the records.

On October 18, 1971 Leuci received copies of the Grand Jury testimony of Hernandez, Beltram and Pulido, the three witnesses whose statements Rosner had already been given in the form of 3500 material. Leuci met with La-

6 This conversation was tape recorded.

mattina and DeStefano on the evening of October 18, 1971. DeStefano entered Leuci's car which was "wired" and Leuci gave him the Grand Jury minutes, the conversation being recorded.

On October 19 Leuci was electronically wired. DeStefano told Leuci that he was waiting for Rosner, who was bringing the money. Rosner appeared and walked around the corner with DeStefano. Through the panes of glass in the corner building Leuci saw Rosner hand something to DeStefano. DeStefano then gave Leuci $350.

The appellant testified in substance as follows:

DeStefano told him on October 2 that the United States Attorney's Office was preparing to indict him in the *Marcone* case; that a witness was testifying against him before the Grand Jury; and that Federal agents suspected that Rosner had the Government's chief witness, Hernandez, killed in the pending subornation of perjury case, *Rosner I.* He testified that by October 3 his head was swimming and he was becoming panicky.

On October 4, DeStefano told him it was important that Rosner attend the meeting with Leuci. At the October 4 meeting, Leuci told Rosner that Rosner was suspected of having Hernandez killed. Rosner testified that he brushed the suggestion off as "ridiculous" and that he protested his own innocence in *Rosner I.* Rosner testified that on October 7 DeStefano told him that the Government was conducting a complete investigation of Rosner. He admitted that he did read and retain the 3500 material, but denied that he had taken the *Marcone* draft indictment; he refused to pay Leuci at first because he thought "Leuci was doing us a favor;" but he conceded that he ultimately gave DeStefano $1,250 on October 12 to pay Leuci, as his share of the $2,500, only because of pressure from DeStefano to split the cost. Rosner testified that Leuci had told

him on October 8 that this money would also cover Grand Jury minutes.

Rosner testified that Leuci pressured him into paying additional money for the Grand Jury minutes. Rosner admitted that he gave DeStefano $750 on October 19 as his share of the $1,500 for the Grand Jury minutes.[7]

This ended the conspiracy, but DeStefano and Lamattina continued to see Leuci.

II.

The Evidence upon the New Trial Motion.

(a) *Conferences with the Prosecutors.*

On December 20, 1971 Leuci met with DeStefano and Lamattina to discuss a criminal matter unrelated to *Rosner I*. During the meeting they discovered that Leuci was acting in an undercover capacity for the Federal Government. DeStefano and Lamattina were immediately taken to the United States Courthouse where they were given *Miranda* warnings, and confronted with the Government's knowledge of the events which later formed the basis for the indictment. Neither one supplied any information that night, but they did agree not to divulge Leuci's cover. They also agreed to meet the investigators again to determine whether there were ways in which they would cooperate.

They did meet Assistant United States Attorneys about thirty times right up to the time they were indicted in this case on July 7, 1972. The recurrent theme of these meetings was whether the pair would cooperate in the instant *Rosner II* case, which they consistently refused to do.

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7 We have gone into the evidence at some length because of the defense of entrapment.

Judge Bauman found this refusal to have been "steadfast" and "from the outset" by both men.

Although they refused to cooperate against appellant, DeStefano did assist the Government in April 1972 by effecting an introduction between an undercover agent and Leon Wasserberger, a co-defendant in *United States* v. *Archer*, F.2d , Slip Op. Nos. 1039, 1040, 1041 (2 Cir. July 12, 1973). Lamattina also cooperated in two instances, in May and June 1972, in investigations unrelated to Rosner.

On June 15, 1972, enterprising reporters revealed Leuci's undercover roles in the *Daily News* and *New York Times*. Immediately DeStefano and Lamattina stopped cooperating with the Government even on unrelated matters. When they were indicted about three weeks later they stopped their talks with the United States Attorney's Office entirely.

The first renewed contact was a few weeks before the scheduled November 20, 1972 trial. DeStefano called Scoppetta to arrange a meeting. Scoppetta met with him and another assistant prosecutor, Ben Veniste, who asked DeStefano to assist the Government in its investigation of corruption. He refused. The Rosner case was not mentioned. The prosecutors then met with Lamattina, as well, at his request. The subsequent discussions with the Government will be summarized when we discuss the contention that DeStefano and Lamattina, as Government agents, invaded the privacy of appellant's conversations with his attorneys.

(b) *Conferences with the Defense Team.*

During the post-conspiracy pre-indictment period, DeStefano was present at numerous meetings where Rosner and his lawyers discussed various aspects of the *Rosner II* case. Lamattina was present during only one such meeting.

Appendix B

On June 16, Rosner and his wife, Nancy, who was one of his counsel in the proceedings below, ran into DeStefano accidentally. The newspaper revelation that Leuci was an undercover agent naturally prompted a wide-ranging discussion of the joint predicament of appellant and DeStefano. The Government did not know of this meeting until the post-trial hearing.

On June 30 Rosner, DeStefano and Lamattina appeared before the Grand Jury. Before they appeared, DeStefano participated in a conference with Rosner and Rosner's several lawyers. After the Grand Jury appearances, DeStefano and Lamattina joined Rosner and their lawyers at lunch, where the case was discussed. After the indictment, Lamattina participated in no more legal conferences, but DeStefano met Rosner alone quite often, and with his lawyers on a number of occasions. The topics discussed ranged over the various aspects of the defense case, including cross-examination of Leuci and the elements of entrapment.

A new phase began when Lamattina pleaded guilty on November 20, when the trial was about to begin. DeStefano met with Rosner and Nancy Rosner to discuss whether it would be advantageous to Rosner's defense of entrapment if DeStefano also pleaded guilty. After Lamattina pleaded guilty he was "debriefed" by the prosecutors on November 22 and November 24.

DeStefano pleaded guilty on November 21, 1972. On November 22 DeStefano requested a meeting with the Government, without his lawyer, to discuss the possibility of cooperation.

DeStefano met with the Government again on November 24 for several hours for the last time during the trial.[8]

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8 There were no tapes or records of these meetings or of what was said. The Government attorneys who participated were all examined as witnesses by defense counsel.

On November 27 DeStefano went to Rosner's office and participated in a two-hour discussion about *Rosner II* with Rosner and his lawyers. Among the matters discussed was Leuci's testimony. Nancy Rosner testified that DeStefano called the Rosners at home during the trial several times to inquire what had happened on a particular day, whether the Rosners thought Lamattina would be a witness, whether character witnesses would be called, and to talk about the media coverage of the trial.

There was no testimony that DeStefano communicated these conversations to the Government attorneys. The Government attorneys denied the receipt of any information gathered by DeStefano from such conversations.

III.

Entrapment.

Although appellant admitted that he had paid Leuci through DeStefano for the 3500 material and the Grand Jury minutes, he contends that he was unlawfully entrapped *as a matter of law* and that the indictment must, therefore, be dismissed. He says that the due process clause forbids the conviction of a defendant on charges which stem from his acceptance of a government offer of corrupt assistance in a criminal case pending *against himself*. He argues that his criminal conduct would not have been possible had not an undercover agent supplied an indispensable means, otherwise unavailable, for the commission of the crime, and that the evidence was insufficient to sustain a finding that he was predisposed to commit the crime. In the alternative, he contends that the trial judge charged the jury improperly on the defense of entrapment. For reasons that will appear, we reject each of these contentions.

The substance of Rosner's defense of entrapment is that he was coerced into crime by Leuci, a Government agent,

posing as a corrupt police officer, with the aid of DeStefano and Lamattina. He asserts that he was "coerced" by being told that he was being investigated in connection with the murder of a missing witness in the *Rosner I* case; that the Government was investigating him generally; and that he was to be indicted in connection with a "payoff" in the *Marcone* case.

It is clear that Leuci did not approach DeStefano about Rosner. Leuci told Lamattina that he had a "contact" in the United States Attorney's Office who might be able to provide information to friends of Lamattina who were the targets of a Federal investigation of corruption in the *Marcone* case. This led to an introduction of DeStefano and Marcone. Rosner was not mentioned. When DeStefano whispered to Lamattina "[t]hat Rosner thing is important to me, too," discussion began about whether Leuci's "friend" could help in the *Rosner I* case.

When DeStefano said he would bring Rosner to meet Leuci, Leuci expressed doubts about Rosner's reliability. When DeStefano reported that Rosner had told him he was not interested in meeting Leuci or getting information about his case, Leuci replied that this was "fine" with him.[9] Despite these preliminaries, Rosner did appear for a meeting with the other three on October 4.

After discussing the *Marcone* case for a while, it was Rosner who asked whether Leuci's "friend" would be able to help in Rosner's subornation case. It was Rosner who asked Leuci to get the "3500 material" and to find out which witnesses were "good" and which "bad." When Leuci stated his ignorance of what "3500 material" meant,

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9 Leuci may have been misleading DeStefano when he purported to be afraid of meeting Rosner, or he may have really feared that Rosner was smart enough to see through his cover. In either case, his language was not that of an entrapper thrusting opportunity on an unwary innocent.

Rosner assured him that his "contact" would understand the term.[10] Rosner told Leuci that if his friend obtained the things requested by Rosner, there would be a lot more money for him in the future.

Later, on October 13, when Leuci told Rosner that he did not see why Rosner needed the Grand Jury minutes since he would get them eventually, and that they would cost an additional $1,000 or $1,500, it was Rosner who said that the Grand Jury minutes would be worth it to him, but that he must have them soon. Rosner also sought to determine whether his own client, Stewart, a witness in a separate case, was a Government informer.

The trial judge submitted the issue of entrapment to the jury and we find that his charge properly expounded the law on the subject.

The Supreme Court in *United States* v. *Russell*, 41 L.W. 4538 (April 24, 1973) has reaffirmed the elements of entrapment that had been explained in two earlier cases, *Sorrello* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958). The Supreme Court rejected the minority view which had been expressed in the earlier cases that even if the defendant had a predisposition to commit the crime, if the Government's conduct nevertheless fell below the standards of proper use of governmental power, entrapment could be found. The Supreme Court in *Russell, supra*, reaffirmed the majority view which Judge Bauman had followed in his charge. When the defendant sustains the burden of proving government inducement, the burden then is cast upon the Government to prove the defendant's predisposition to commit the crime beyond a rea-

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10 At this meeting Leuci saw money pass from appellant to DeStefano who then passed $400 under the table. The jury acquitted appellant on Count 4 which charged the payment of this $400 as a bribe, as well as on Count 5 regarding a payment of $100 on October 8, 1971.

sonable doubt, but if predisposition is proved the judgment of conviction will generally stand regardless of the Government's activity. *United States* v. *Russell, supra.* In this case the Court gave the jury appropriate instructions, both on inducement[11] and on predisposition.[12]

Appellant contends that leaving the issue of entrapment to the jury was not enough; that the Judge should have found entrapment as a matter of law. We disagree. There is not enough credible evidence, without the testimony of the appellant himself, to sustain the defense of entrapment. The trial court need not accept the defendant's version as true or take the question of his credibility from the jury.

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11 "The fact that the Government officials or their agents merely afford opportunities to one who is ready and willing to violate the law when the opportunity presents itself does not constitute entrapment. However, in their efforts to enforce the laws, Government officials and their agents may not entrap an innocent person who, except for the Government's inducement, would not have engaged in the criminal conduct charged.

"Entrapment occurs only when the criminal conduct was the product of the creative activity of the law enforcement officials or their agents, that is, if they initiate, incite, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct. And if that occurs, the Government may not avail itself of the fruits of this instigation.

"In this regard, the defendant asserts that he was induced to violate the law by the activities of Leuci, a Government agent, both by Leuci's actions in direct discussions with him and also by Leuci's utilization of DeStefano and Lamattina to apply pressure on him."

12 "Thus, if the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offenses charged and merely was awaiting a favorable opportunity to commit them, then you may find that the Government did no more than furnish a convenient opening for the criminal activity in which the defendant was prepared to engage. In such circumstances, you may find that the Government's agent has not seduced an innocent person but has only provided the means for the defendant to effectuate or realize his own then existing purposes.

"On the other hand, if you have a reasonable doubt that the defendant would have committed the offenses charged without the Government's inducement, then it is your duty to acquit him."

"The truth of the matter was for the jury to determine." *Osborn* v. *United States*, 385 U.S. 323, 331 (1966); *United States* v. *Braver*, 450 F.2d 799, 803 (2 Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972). Judge Bauman properly gave the jury the appellant's contention and the elements of entrapment. He left to the jury the credibility of the witnesses. *See United States* v. *Cuomo*, 479 F.2d 688, 691 (2 Cir., 1973).[13] They decided, on proper instructions, that the defense of entrapment did not stand up, and that predisposition had been proved beyond a reasonable doubt.

We note, in passing, that we do not agree with appellant's premise that a man under indictment, simply because he is a defendant, has a larger claim than others to an entrapment defense when he attempts to bribe or to obstruct justice. Nor is proof of prior bribery a necessary requisite for a finding of predisposition. *See, e.g., United States* v. *Greenberg*, 444 F.2d 369 (2 Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Haley*, 452 F.2d 398 (8 Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). That Rosner desired corrupt information in a number of cases tends further to establish his predisposition to obtain such information by unlawful means. Bribery is no more a prerogative of the defendant himself than of his lawyer or agent. The coercion of external events may press hard on a defendant in a criminal case but makes no less culpable the acceptance of corrupt advice. This was not an extortion where the government agent purported to control the process of in-

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13 The trial judge reminded the jury of Rosner's testimony that he had been told that a friend of Lamattina's [Leuci] had said that "the United States Attorney's Office had information that Pedro Hernandez had been killed and that they were gathering evidence to establish that Rosner had had Hernandez killed . . . that the Government was going to ask the judge handling Rosner's pending case to imprison him . . . and that Felix Martinez, a client of Rosner's, was about to implicate Rosner in the fix of his, Martinez', narcotics case in Queens, and Rosner could expect to be indicted for that."

dictment or even of investigation. The entire subject was unlawfully obtained information and documentation, not action.

The argument that the agent supplied the means for the commission of the crime—the 3500 material and the grand jury minutes—and that this, in spite of predisposition, constitutes entrapment in law is untenable. *United States* v. *Russell, supra.* We have held legitimate the activities of agents passing as corrupt, because bribery, like narcotics dealing, is hard to detect except by infiltration, and Lamattina and DeStefano were clearly corrupt people and proper targets. See *United States* v. *Mascia*, 447 F.2d 1111 (2 Cir. 1971), *cert. denied,* 404 U.S. 1025, *reh. denied,* 405 U.S. 969 (1972); *United States* v. *Greenberg, supra.* Nor is there any valid claim that Leuci in his operations broke the law or committed crimes, *cf. United States* v. *Archer, supra,* Slip Op. at 4820; for the activity of the undercover agent here was not different in kind from the every day activity of the undercover agent in narcotics cases who lacks criminal intent because his intention is to expose rather than to commit crime.

Appellant also contends that the Court erred in refusing to charge Request No. 8, which reads:

> "The defendant asserts that he was entrapped when he obtained the 3500 material and the grand jury minutes. I charge you that although the grand jury minutes were obtained several days after the 3500 material, a separate independent inducement need not be shown as to the grand jury minutes, where their acquisition 'was part of a course of conduct which was the product of the initial inducement.' "

In the context of the case, there could have been no misapprehension by the jury on this score. The conspiracy count charged a conspiracy to violate 18 U.S.C. §§ 1503,

201(b), 641 and 2071, and that it was part of the conspiracy corruptly to impede the due administration of justice by unlawfully obtaining, in return for cash payments, certain documents, including transcripts of grand jury testimony and statements of prospective government witnesses in the then pending *Rosner I* case, and a draft copy of an indictment, yet to be voted, involving one Dominick J. Marcone.

The evidence showed a single continuous course of dealing and no one suggested that there was anything but a single continuing inducement.[14] The evidence showed that it was Rosner who insisted on getting the Grand Jury minutes promptly although Leuci did not see why he needed them in advance of trial. In the circumstances, giving the charge requested would have been confusing, even though in a proper case where a jury could find that a later crime occurred only after an earlier inducement had been dissipated, such an instruction might be given. See *Sherman* v. *United States*, 356 U.S. 369, 374 (1958).

IV.

Privacy of Legal Conferences.

Appellant contends that Judge Bauman erred in denying his motion for a new trial because of intrusion by alleged Government agents into conferences between himself and his counsel, including his wife Nancy, who is a lawyer. Appellant asserts that the assumed intrusion invokes a *per se* rule which compels reversal of the judgment of

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14 The instruction concerning inducement embraced the conception not only of committing a crime but also of engaging in "criminal conduct," and explained that "if that occurs, the Government may not avail itself of the fruits of this investigation." The Court, moreover, consistently referred to "the crimes charged" or "the offenses charged" in the plural, making it obvious that the alleged inducement was to be considered pervasive of the entire course of conduct.

conviction without any showing of prejudice to the defendant. *Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952); *Caldwell* v. *New Jersey,* 205 F.2d 879 (D.C. Cir. 1953), *cert. denied,* 349 U.S. 930, *reh. denied,* 349 U.S. 969 (1955); *see Black* v. *United States,* 385 U.S. 26 (1966); *O'Brien* v. *United States,* 386 U.S. 345 (1967); and *see Hoffa* v. *United States,* 385 U.S. 293 (1966).

The two persons described as "agents of the Government" by Rosner are DeStefano and Lamattina. Appellant asserts that the participation of these individuals in strategy conferences with Rosner's lawyers violated his Sixth Amendment right freely to consult his counsel without Governmental intrusion. We do not lightly regard so serious a constitutional claim, for the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel. *Glasser* v. *United States,* 315 U.S. 60 (1942). We conclude, however, that a finding of unlawful intrusion must precede the determination of its consequences. We can make no such finding here. Judge Bauman, after hearing the witnesses, found to the contrary. Even if, on a constitutional issue, we would eschew reliance on the "clearly erroneous" test, see *Chapman* v. *California,* 386 U.S. 18, 24 (1967), we are convinced, on our own review of the evidence, that the Government has sustained its contention beyond a reasonable doubt.[15]

Lamattina's alleged participation in the counsels of the defense was quite limited. The only time he appeared at a talk between Rosner and counsel was at a lunch discussion in Gassner's Restaurant after the Grand Jury appearance of the three prospective defendants in the instant case on June 30, 1972, before indictment. DeStefano's contacts

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15 The trial judge conducted an extensive evidentiary hearing at which the prosecutors, the alleged informers and defense counsel testified.

with Rosner and his counsel were more frequent. Albert Krieger, who had been retained on June 17, 1972 as Rosner's trial counsel, recalled the participation of DeStefano only two or three times in conferences which Krieger attended. He recalled no pre-indictment conference except that of June 30. He recalled one conversation with Mr. and Mrs. Rosner, in which DeStefano participated, as having taken place in November, shortly before the trial. According to Mr. Krieger, DeStefano was told, among other things, that his taped conversations were "very heavy evidence" against him. He was asked whether he was going to plead guilty and was also asked to give some information that might help the entrapment defense. He was also asked for information to attack the credibility of Leuci.[16]

It is apparent that Krieger and Rosner knew even then of the distinct possibility that DeStefano might plead guilty. Indeed, Krieger stated that very possibility in open court on November 20, before the jury was selected. The defense team must have known that, in human experience, the pressure of imminent incarceration tends to snap the bonds of loyalty.

At any rate, Mr. Krieger apparently took the position that he was better off continuing to see DeStefano to ask him whether Lamattina would testify against Rosner and to find out what else Lamattina knew about Rosner. Krieger went to the extent of befriending DeStefano by making a bail application on his behalf on November 27 against the Government's efforts to remand him, as Krieger thought, "to put pressure on DeStefano" and avoided asking him

16 Since DeStefano was represented by separate counsel it is not clear why DeStefano was asked questions and given advice without the presence of his own counsel. We assume that DeStefano's lawyer had no objection to this procedure.

certain questions for fear that "would just shut him off completely."

After DeStefano was, at long last, debriefed by the Government on November 24, he saw the defense team on November 27. But after the meeting with the defense team he did not see the prosecutors again until after the *Rosner* trial was over.

From the chronology of largely uncontested events it appears that from the time he agreed to cooperate in the *Rosner* case, DeStefano had no further contact with the Government, and, hence, there was no opportunity for prejudice.

After the debriefing of November 24, the Government should have told DeStefano not to go near the legal conferences of the defense, and we suggest that this be done in the future. We recognize, however, that the prosecutors had no reason to believe that he would do so after his plea of guilty had been made publicly, or that the defense would trust him if he did. DeStefano had been warned at the outset not to divulge anything to the prosecutors concerning the defense.[17] We have recently held that where there is no opportunity for prejudice, even governmental intrusion will not require reversal. *United States* v. *Mosca*, 475 F.2d 1052 (2 Cir. 1973); see also *United States* v. *Zarzour*, 432 F.2d 1 (5 Cir. 1970).

Appellant contends that he was prejudiced in his Sixth Amendment right, by the Government's use in his cross-examination of the "*Reardon Case*." An inference is sought to be drawn that DeStefano learned about the *Reardon* case, in which Lamattina himself had been the arresting

17 In a waiver he was later asked to sign there was included the statement "Both Mr. Scoppetta and Mr. Morvillo have informed me that they will not discuss any of the facts of the trial or any possible defenses that I and my co-defendants [Rosner] may have to the charges." At the time DeStefano had refused to sign the waiver. He later did sign.

officer, from the legal discussions of the defense team, and that he had then prompted Lamattina to tell the prosecutors about it. The inference was not supported. The only lawyer who testified to any discussion of the *Reardon* case with DeStefano was Mr. Krieger, who testified that the case was discussed with DeStefano after Lamattina had already pleaded guilty. Krieger, who already knew about the *Reardon* case, asked DeStefano whether DeStefano knew anything about the *Reardon* case, and whether Lamattina might use the case against Rosner. According to Krieger, DeStefano indicated that Lamattina had committed perjury in the *Reardon* case, that Rosner had discovered the perjury and that Lamattina had protected himself by not appearing in court and that this had resulted in a dismissal of the indictment. Krieger obviously could have obtained this information, or facts which were more incriminating, from Rosner himself. He was seeking information from DeStefano which Rosner might not have, rather than seeking repetition of what DeStefano might have learned from Rosner. There is simply no proof in the record that DeStefano learned about the *Reardon* case from participating in the counsels of the defense rather than from his friend Lamattina or from Rosner at the time of its occurrence. Mr. Krieger placed the meeting as having taken place after he had made a bail application on behalf of DeStefano, which was on November 27. This was five days after the Government had already been told about the *Reardon* case. In any event, after the Krieger meeting described, DeStefano did not speak to the prosecutors again until after the trial.

The appellant relies on the circumstance that on December 20, 1971, when upon their discovery that Leuci was a Government "plant," DeStefano and Lamattina were brought to the United States Attorney's office, they were told what the prosecutors had on them, and their "co-

operation" was solicited. The evidence is clear that neither one, at the time, acquiesced in the Government suggestion.

There is neither contention nor proof that Lamattina or DeStefano were sham defendants who were indicted to lull a co-defendant by concealing an immunity already given. *Cf. United States* v. *Rispo*, 460 F.2d 965 (3 Cir. 1972); see *United States* v. *Archer, supra.* There is no question that when the Grand Jury indicted Lamattina and DeStefano with Rosner on July 7, 1972, the Government meant business and that Lamattina and DeStefano were quite aware of that.

Here we must pause to analyze the situation as it stood on December 20, 1971. The pair were targets of an investigation. Their "cooperation" could involve two aspects: They could implicate Rosner in the case at hand or in other cases; or they could stay faithful to Rosner and themselves in the case at hand, and cooperate with the Government in *other* matters, including active participation in current and future investigations. Assistant United States Attorney Shaw testified that they made it clear from the outset that they would not testify against Rosner or even give information about other dealings they had with Rosner. In fact, until the debriefing during the week of November 20, 1972, they gave no information about Rosner. Their limited cooperation in other matters, in the pre-indictment phase, was in no way related to appellant.

There is no evidence that the Government knew that DeStefano was seeing Rosner, Mrs. Rosner or other lawyers associated with the defense. While the pair were, for a time, helping the Government in certain respects, they were not general informers, and they had each specifically abjured the role of informer against Rosner.

We think that this type of non-prejudicial "cooperation" falls short of inviting the application of a *per se* rule.[18]

Appellant contends, nevertheless, that when the United States Attorney *asked* for the cooperation of DeStefano and Lamattina, they should have been told at once not to participate in sessions with Rosner and his lawyers.[19]

The question is whether the prosecutor had any right to tell a prospective defendant not to engage in conferences with the attorneys for a co-defendant. The Sixth Amendment right of DeStefano and Lamattina, as well as that of appellant, had to be respected. The Government by merely proposing a cooperation that stands unaccepted cannot cut off the right of the offeree to pursue his own constitutional right to legal advice in his own defense. Each could contribute what he thought useful to the common defense, and glean what he might for his own defense. Neither had agreed to serve as a human recording device for the prosecution.

If the co-defendants were not intruding agents of the Government there was no constitutional restraint on their ultimately divulging what they had learned. There is, indeed, proof in this record that they actually did not divulge anything. An attorney and his client who meet freely with potential co-defendants in a criminal case always expose themselves to the risk of a subsequent disloyalty by the

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18 Compare *United States* v. *Edwards*, 366 F.2d 853, 873 (2 Cir. 1966), *cert. denied*, 386 U.S. 908 (1967), where we recognized in the context of a *Massiah* (377 U.S. 201 (1964)) situation that a person may be involved in two "distinct and unrelated crimes." And see also *United States* v. *DeSapio*, 456 F.2d 644, 650 (2 Cir.), *cert. denied*, 406 U.S. 933 (1972).

19 We have been cited to only two cases in this area where multiple defendants were involved and where a co-defendant was the alleged eavesdropper. *United States* v. *Mosca*, *supra*, and *United States* v. *Rispo*, *supra*. In *Rispo* the informer was a sham defendant. We discuss *Mosca*, *infra*.

co-defendant whom they might have been better advised to examine through his own attorney, without the risk of unwitting disclosure.[20] The attempted disclosure of the content of a joint conference of co-defendants with the lawyer of one of them may possibly give rise to a claim of privilege, see Proposed Rules of Evidence for the United States Courts, Rule 503(b)(3), but the breach of a common law privilege, as such, is not necessarily of constitutional dimension. The constitutional barrier is raised when it is the Government that unlawfully intrudes on legal strategy conferences, as when it eavesdrops by electronic means, *Black* v. *United States, supra,* or when it "plants" a spy in the legal conference, *Caldwell* v. *New Jersey, supra.*

We do not reach the constitutional limitation here, for there is no reason to believe on this record that Lamattina or DeStefano, as we have traced their participation, were ever "planted" by the Government to discover defense secrets.

A *per se* rule must, in any event, be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of governmental propriety that it is offensive to a rule of liberty under law. (*Katz* v. *United States,* 389 U.S. 347 (1967).) The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same

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20 In a Fourth Amendment context, the Supreme Court noted that "he [Hoffa] was relying upon his misplaced confidence that Partin [the alleged informer] would not reveal his wrongdoing." See *Hoffa* v. *United States, supra,* 385 U.S. at 302. And Mr. Justice Douglas, dissenting in the companion case of *Osborn* v. *United States,* 385 U.S. 346, 347 (1956), noted the difference between the Government being "the willing recipient of information supplied by a fickle friend" and where the Government has "participated in a breach of privacy by sending in an undercover agent." Of course, where an informer actually testifies and the Government suppresses his status as an informer, the case is quite different. *Cf. United States* v. *Hale,* 462 F.2d 918 (2 Cir. 1972).

cloth. See *United States* v. *Archer, supra; United States* v. *Rispo, supra; United States* v. *Lusterino*, 450 F.2d 572 (2 Cir. 1971). The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different from planting an electronic listening device. *Caldwell* v. *United States, supra.*

In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court, in the *Hoffa* case, considered *Coplon, supra,* and *Caldwell, supra,* so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa* v. *United States, supra*, 385 U.S. at 306. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (*People* v. *Defore*, 242 N.Y. 13 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others. See Mr. Justice Holmes dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 469 (1928).

When the Government is not found guilty of such avowed corrupting conduct, however, the rule must, of necessity, be different. *See United States ex rel. Cooper* v. *Denno*, 221 F.2d 626 (2 Cir.), *cert. denied*, 346 U.S. 156 (1955). There is then no need to punish the prosecutor by freeing the defendant. The matter must then proceed to an ultimate adjudication of whether the defendant was prejudiced in fact. We have recently followed this rationale in *United States* v. *Mosca, supra.*

A holding that the *per se* rule applied to this case would mean an ultimate dismissal of the indictment. If there was,

indeed, intrusion there is nothing tangible to exclude from the new trial, for nothing tangible was admitted in the first trial. The appellant would then argue that he was without means to remedy such a pervasive defect, and that the alleged taint remains immutable, no matter how many trials to different juries. *See United States* v. *Cory*, 382 P.2d 1019 (Sup. Ct., Wash. 1963); *Fusco* v. *Moses*, 304 N.Y. 424 (1952).[21] If circumstances warranted it we would not shrink from such a result. *See United States* v. *Archer*, *supra*, but we do not find that such circumstances exist in this case.

The contention is made that since the United States Attorney in the *Biaggi* matter, Docket Nos. 73-1622, 73-1652, conceded that it was not a crime for an attorney, not directly involved in the particular investigation, to make Grand Jury testimony available or for an investigative reporter to seek a copy of such testimony, the appellant committed no crime.

We have put no imprimatur on the Government's report. Nor do we acquiesce in the view that anyone, investigative reporter or counsel for a defendant, may poach on the secret preserve of the Grand Jury. The proceedings of the Grand Jury are secret by the prescription of history as well as by rule of procedure. (See VI Wigmore on Evidence §§ 1850-55, 1859(g) (3d ed., 1940).) A system under which a zealous corrupter may gain information, while his ethical fellow may not, would exact a high premium for corruption with no corresponding gain to the public interest or legitimate private right. The *Archer* opinion is cited as suggesting reversal in this case. Treating respectfully the dicta of the *Archer* panel concerning government activ-

21 Mr. Justice Stewart noted the problem in *Hoffa* v. *United States*, *supra*, 385 U.S. at 307-08.

ity in the creation of crime, we note that the activities in *Archer* were alleged corruption of a state official in connection with a purported state crime, the federal jurisdiction being attenuated to the point of contrived fiction. The activities of the federal agents, indeed, the whole concept, involved the *purported commission* of state crimes to lure the Assistant District Attorney there involved. In the instant case there was no *independent* crime, no perjury before a Grand Jury and no substantive criminal conduct as a step to ultimate enticement of the defendant.

Impossibility of Success.

The last argument is that the crimes of conspiracy, of endeavoring to obstruct justice and of bribery were not legally capable of attainment, since the Government knew what was going on all the time. Appellant cites *United States* v. *Berrigan and McAllister*, —— F.2d ——, Docket Nos. 72-1938, 72-1939 (3 Cir. 1973) in support. There the conviction of Father Berrigan and Sister McAllister for violation of 18 U.S.C. § 1791 and 28 C.F.R. § 6.1 by attempting to take something out of a federal penal institution "without the knowledge and consent of the warden" was reversed.

Appellant's citation is wide of the mark. The obstruction of justice statute, 18 U.S.C. § 1503, defines the offender as one who "endeavors"—not one who "attempts"—to influence an officer in the performance of his duty, or as one who "endeavors to influence the due administration of justice." In *Osborn* v. *United States*, 385 U.S. 323, 332 (1966), the Supreme Court said, "[w]hatever continuing validity the doctrine of 'impossibility', with all its subtleties, may continue to have in the law of criminal attempt, that body of law is inapplicable here. The statute [18 U.S.C. § 1503] under which the petitioner was convicted makes an

offense of any proscribed endeavor . . . ." [footnote omitted; citing *United States* v. *Russell*, 255 U.S. 138, 143].[22]

Conspiracy, of course, is an agreement plus an overt act, and the possibility of success has never been thought to be of its essence. (*United States* v. *Kellerman*, 431 F.2d 319 (2 Cir.), *cert. denied*, 400 U.S. 957 (1970).) Bribery, as defined in 18 U.S.C. § 201(b), prohibits offering anything of value to a public official. We have said that "[s]ection 201(b) is violated even though the official offered the bribe is not corrupted, or the object of the bribe could not be attained . . . ." *United States* v. *Jacobs*, 431 F.2d 754, 759-60 (2 Cir. 1970), *cert. denied*, 402 U.S. 950 *reh. denied*, 403 U.S. 912 (1971).

For the foregoing reasons the conviction will be affirmed.

V.

The Sentencing Procedure

The appellant contends that the procedure followed on his sentencing requires a remand for resentencing. We agree.

The sentencing judge received a memorandum from the United States Attorney's office, which the Probation Department did not screen or verify, consisting of sixteen closely typed pages and appendices, outlining alleged "possible misrepresentations, fraudulent conduct, lying, and unethical behavior" on the part of the appellant, involving at least seventeen events, the prosecution stating candidly that "it is impossible to prove all such events." *Cf. United States* v. *Pfingst*, 477 F.2d 177, 192 (2 Cir.

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22 This also dilutes appellant's argument that because Judge Wyatt authorized the Grand Jury minutes to be given to Leuci to give to Rosner, no crime could be committed by Rosner. In *Osborn*, two judges of the District Court had authorized the planting of an electronic listening device to record conversations between the petitioner and the undisclosed Government informer.

1973), citing ABA Standards Relating to Probation § 2.3(ii) (B) and Commentary (1970), and *cf. United States* v. *Weston*, 448 F.2d 626 (9 Cir.), *cert. denied*, 404 U.S. 1061 (1971).

The memorandum, which included hearsay, inferences and conclusions, remained *in camera* for over two months, through successive adjournments of sentence. On the morning of the actual sentencing, defense counsel was given the presentence report of the Probation Department, and the judge, of his own volition, also made known the existence of the prosecutor's memorandum. He stated that since "I am considering that" in connection with the sentence, defense counsel also should see it.

That morning when Mr. Krieger, chief defense counsel, was shown the prosecutor's memorandum, he asked for an adjournment so that he could have "an opportunity to answer them." Although defense counsel had had no time to review or possibly even to absorb seventeen separate incidents hitherto unfamiliar to him, the request for an adjournment of the sentence was denied. The Assistant United States Attorney then made a strong plea that "Mr. Rosner be dealt with in the harshest possible terms."

In *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), the Supreme Court held that an excessive severity of sentence within the statutory maximum is not reviewable, but that where the sentencing court seriously misreads the defendant's record and proceeds to sentence on false assumptions, the failure to supply counsel to the defendant makes the error one of constitutional magnitude.

Here the defendant did have able and conscientious counsel, but unless counsel was given adequate opportunity to correct any misinformation in the prosecutor's memorandum, we doubt that his spontaneous comment before sentence was adequate to afford the defendant his due.

See *United States* v. *Picard*, 464 F.2d 215, 220 (1 Cir. 1972); *United States* v. *Hone*, 456 F.2d 495, 496 (6 Cir. 1972). We do not treat a violation Fed. R. Crim. P. 32(a), such as is here alleged, as necessarily one of due process. See *Hill* v. *United States*, 368 U.S. 424, 428 (1962) and *United States* v. *Fischer*, 381 F.2d 509 (2 Cir. 1967), *cert. denied*, 390 U.S. 973 (1968) [cases of collateral attack], *United States* v. *Malcolm*, 432 F.2d 809, 818 (2 Cir. 1970). But we think that Rule 32(a) must be fairly read to give the defendant not only the right "to make a statement on his own behalf" but, in this context, also "to present any information in mitigation of punishment." *Green* v. *United States*, 365 U.S. 301, 304 (1961).[23]

The manner of rebutting hearsay assertions in a pre-sentence probation report must generally rest in the informed discretion of the sentencing judge. The tender of such proof does not mandate an evidentiary hearing. *See Williams* v. *New York*, 337 U.S. 241, 246-57 (1949); *United States* v. *Needles*, 472 F.2d 652, 657-658 (2 Cir. 1973); *United States* v. *Malcolm, supra*, 432 F.2d at 816. On the other hand, where the pre-sentence report is furnished to the defendant pursuant to the permissive provision of Rule 32(c), the defendant should have the opportunity, if the factual background is erroneous, to inform the Court about the alleged misinformation. *See United States* v. *Virga*, 426 F.2d 1320, 1323 (2 Cir. 1970), *cert. denied*, 402 U.S. 930 (1971). Normally, verbal explanation or comment is sufficient. *United States* v. *Carden*, 428 F.2d 1116, 1118 (8 Cir. 1970).

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23 Rule 32(a) reads as follows:

"Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In the case at bar, we are dealing not only with a report by the Probation Department in which confidentiality of source may prove a serious consideration in particular cases, see *Baker* v. *United States*, 388 F.2d 931 (4 Cir. 1968), but also with a report of accumulated conclusions and hearsay of Assistant United States Attorneys presented by the prosecuting staff, which accompanied it orally by an adversary plea for a maximum sentence. We doubt neither the good faith of the United States Attorney's office, which understandably reacted sharply to a covert attempt to corrupt it, nor the ability of the trial judge to separate the wheat from the chaff. But we think this winnowing should have been done only after "affording an opportunity to answer or explain," *see United States* v. *Brown*, 470 F.2d 285, 288 (2 Cir. 1972), by means short of an evidentiary hearing but not in "a niggardly fashion." *See United States* v. *Fischer, supra*, at 512. See also ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures § 513(F)(iii)(A), concerning the duty of defense counsel "to controvert any inaccuracies in the [pre-sentence] report;" and see Notes, Advisory Committee on Rules, Fed. R. Crim. P. 32(c)(2), 18 U.S.C. Supp. 1970.[24]

We recognize that the District Judge was justified in not tendering the report in advance of sentence because the pre-sentence report had not been asked for. When it was tendered, however, not enough time was given for reply in the light of the diverse accusations made. This Court has said that "it would have been preferable for the court to have revealed its contents [the presentence report] to defendant far enough in advance of sentencing to give him

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24 It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences.

an opportunity to counter them." *United States* v. *Holder*, 412 F.2d 212, 215 (2 Cir. 1969). In the *Holder* case, vacation of sentence was deemed unnecessary. But we are now confronted, not with a neutral presentence report, but with the adversary "memorandum" previously described.[25]

We commend the District Judge for disclosing the United States Attorney's report to defense counsel, *see United States* v. *Trice*, 412 F.2d 209 (6 Cir. 1969); *United States* v. *Solomon*, 422 F.2d 1110 (7 Cir.), *cert. denied*, 399 U.S. 911, *reh. denied*, 400 U.S. 855 (1970), but we feel that he should have given counsel sufficient time for useful examination and rebuttal in view of the one-sided and potentially devastating disclosures of asserted bad conduct by the defendant.[26] *Audi alteram partem* is an ancient principle of justice, not impervious to exception for confidentiality, yet a fair general rule to apply, we think, before a judge finishes the profound soliloquy that precedes a just sentence.

It is the combination of factors here that we think made the procedure wanting. The report was by the prosecutor, not a professional neutral; it was retained by the judge *in camera* for two months before the sentence; it was shown to defense counsel only on the morning of the sentencing; a timely request for a continuance to contradict the report was denied.

We are of the opinion that a proper reading of the scope of Fed.R.Cr.P. 32 in the unusual circumstances of this

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25 We need not go as far as the First Circuit did in *Haller* v. *Robbins*, 409 F.2d 857, 859 (1 Cir. 1969) and yet agree with its comment relating to an *ex parte* report to the sentencing judge. "[H]owever impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case."

26 The Seventh Circuit has made it a rule that District Judges who receive a report from the prosecutor must disclose its contents to defense counsel. *United States* v. *Solomon*, *supra*, 422 F.2d at 1121. As a panel, we make no such rule but commend its spirit to our colleagues of the trial bench.

case, compels a remand for resentencing. The resentencing should be done by another judge. In that respect we adopt the rationale of the First Circuit, "[i]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn." See *Mawson* v. *United States*, 463 F.2d 29 (1 Cir. 1972).

In resentencing, the judge redrawn will either not consider the prosecutor's report, or if he deems it desirable to read it, will afford a reasonable opportunity, in advance of sentencing, to defense counsel to attempt to refute its accusations. We do not, however, order an evidentiary hearing. *Williams* v. *New York, supra.*[27] Nor do we make any suggestion regarding the appropriate sentence.

The conviction is affirmed; the sentence is vacated and the case is remanded for resentencing in conformity with this opinion.

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27 We do not accept the suggestion of amicus that the prosecution memorandum itself should not, as a matter of law, be seen by the sentencing judge.

Appendix C

Order of Circuit Court denying rehearing or rehearing en banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of November, one thousand nine hundred and seventy-three.

Present:

HON. JAMES L. OAKES,

HON. LEONARD P. MOORE,

Circuit Judges,

HON. MURRAY I. GURFEIN,

District Judge.

73-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

NICHOLAS DESTEFANO, NICHOLAS J. LAMATTINA and EDMUND ROSNER,

Defendants,

EDMUND ROSNER,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Appendix C

Upon consideration thereof, it is
Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

Appendix C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of November, one thousand nine hundred and seventy-three.

73-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

NICHOLAS DESTEFANO, NICHOLAS J. LAMATTINA and EDMUND ROSNER,

Defendants,

EDMUND ROSNER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

Appendix D

Judgment of the United States Court of Appeals to the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
Circuit Judges,
HON. MURRAY I. GURFEIN,
District Judge.

73-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDMUND ROSNER,

Defendant-Appellant,

NICHOLAS DESTEFANO, NICHOLAS J. LAMATTINA,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered, adjudged and decreed that the sentence of the court below be and it hereby is vacated and that the action be and it hereby is remanded to said District Court for resentencing in conformity with the opinion of this court.

A. Daniel Fusaro,
Clerk

by: Vincent A. Carlin
Chief Deputy Clerk

Appendix E

Opinion of Bauman, *District Judge*

Defendant Edmund Rosner has moved to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure and to suppress evidence of certain conversations between himself and a Government agent. For the reasons that follow, the motion to dismiss is granted as to Count 3 and as to all reference to 18 U.S.C. § 2071 in Count 1. The motion is denied in all other respects. The motion to suppress is also denied.

The indictment, which is something less than a masterpiece of draftsmanship, charges the defendants in eight counts. They are accused of obstruction of justice (Count 2); removal of Government documents (Count 3); and bribery of a public official (Counts 4 through 8). Count 1 charges them with conspiring to commit those substantive crimes and also with conspiring to receive stolen Government property. All of the charges are founded on a single course of alleged criminal conduct.

At the outset it should be observed that the legal test of sufficiency is not whether the indictment could have been more artfully and precisely drawn, but whether it states the elements of the offenses intended to be charged, and adequately apprises the defendant of what he must be prepared to meet. Russell v. United States, 369 U.S. 749, 763-764, 82 S.Ct. 1938, 8 L.Ed.2d 240 (1962); United States v. Debrow, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92 (1953). Cf. F.R.Cr.P. 7(c).

The Government alleges, in the indictment as supplemented by the bill of particulars, that the defendants met on several occasions with Detective Robert S. Leuci of the New York City Police Department who "under instructions

of the United States Attorney's Office for the Southern District of New York assumed the role of a policeman willing to engage in corrupt activities in return for bribes." (Indictment p. 2) Leuci agreed, it is charged, to obtain for the defendants information concerning various criminal matters pending in the District Court and its Grand Jury. Among these were: (a) the case of United States v. DeStefano, Rosner et al., 70 Cr. 1030, in which defendants Rosner and DeStefano were awaiting trial; (b) a Grand Jury investigation into allegations that one Dominick J. Marcone had "fixed" a Queens narcotics case; and, (c) the case of United States v. Bynum, a narcotics conspiracy case then awaiting trial before Judge Pollack. The Government alleges that Rosner and DeStefano, with the help of Lamattina, made payments totalling $2,850 to Leuci for this information. It was intended that Leuci pass on these payments to an allegedly corrupt contact in the United States Attorney's Office in consideration of which he would turn over "3500 material", Grand Jury minutes and the draft of a contemplated indictment.

I. *Obstruction of Justice*

Count 2 charges the defendants with endeavoring to "influence, obstruct, and impede the due administration of justice" by paying $2,850 for those documents in violation of 18 U.S.C. §1503.[1] Rosner argues that this count must be dismissed because it fails to charge any acts which violate that statute.

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[1] 18 U.S.C. § 1503:

"Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other com-

Appendix E

His claim rests on a particular method of reading § 1503. That statute, he argues, can be divided into two parts. The first part proscribes any effort to influence, threaten, or intimidate various specific groups of persons involved in the administration of justice: witnesses, jurors, officers, commissioners, or committing magistrates. The second in the omnibus provision contained in the last two lines: "or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Rosner argues that this language only proscribes acts similar to those mentioned in the specific language of the first part. In other words, the omnibus provision must be construed in accordance with the principle known as *eiusdem generis*. Rosner consequently suggests that the second part of the statute only prohibits acts of coercion or intimidation against individuals involved in the judicial process. Since the obtaining of Government documents is not an attempt to coerce or influence anyone, it is not within the contemplation of

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mitting magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

the statute. Therefore, the argument continues, the indictment fails to state an offense under § 1503.

The difficulty is that the authority for such a construction of § 1503 is not particularly persuasive. Rosner relies principally on United States v. Scoratow, 137 F.Supp. 620 (W.D.Pa.1956), which held that interference with an FBI investigation was not encompassed by the "obstruction of justice" clause of § 1503 because the FBI is an investigative rather than a judicial arm of the Government; and Haili v. United States, 260 F.2d 744 (9th Cir. 1958), which invalidated the conviction under that section of a person who induced a convicted felon to violate the terms of her probation. Both of these cases, *Haili* explicitly and *Scoratow* by implication, adopted the *eiusdem generis* construction. Rosner also cites United States v. Essex, 407 F.2d 214 (6th Cir. 1969), which follows *Haili*.

It is eminently clear, however, that this principle of statutory construction has never been applied to § 1503 in this Circuit and has indeed been explicitly rejected. In United States v. Solow, 138 F.Supp. 812 (S.D.N.Y.1956), an indictment charging defendants with the destruction of documents to prevent their production before a Grand Jury was held to state an offense under the omnibus provision. Judge Weinfeld said: "[T]his latter provision ... is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice."

United States v. Cohn, 452 F.2d 881 (2nd Cir. 1971), cert. denied 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249 (1972), extended the sweep of § 1503 to the giving of false and evasive testimony before a Grand Jury. The Court of Appeals for this Circuit in United States v. Alo, 439 F.2d 751 (2nd Cir. 1971), cert. denied 404 U.S. 850, 92

S.Ct. 86, 30 L.Ed.2d 89 (1971), had already rejected the application of the *eiusdem generis* principle to 18 U.S.C. § 1505, a companion statute to § 1503, which prohibits the obstruction of proceedings before Congressional committees or administrative agencies. In *Cohn*, the Court went on to say that it could see no reason for adopting the principle with regard to § 1503. See also, United States v. Cohen, 202 F.Supp. 587 (D.Conn.1962); United States v. Bonnano, 177 F.Supp. 106 (S.D.N.Y.1959), reversed on other grounds 285 F.2d 408 (2nd Cir. 1960).

Regardless, therefore, of how this statute has been construed elsewhere, in this Circuit the omnibus clause of § 1503 has been construed broadly. It embraces the widest variety of conduct that impedes the judicial process. I therefore hold that Count 2 of the Indictment is not defective on its face, and defendant's motion to dismiss that Count is hereby denied.

II. *Removal of Documents*

Count 3 charges the defendants with removing, attempting to remove, and causing to be removed, records, documents and papers kept in the files of the United States Attorney's Office for the Southern District of New York. Such conduct is alleged to violate 18 U.S.C. § 2071.[2] It

[2] 18 U.S.C. § 2071:

"(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully

is not disputed, however, that they are not accused of actually removing documents in the Government's possession, but rather of obtaining photocopies. The Government's Memorandum (at page 5) describes their conduct as follows: "The defendants' alleged scheme had called in part for Leuci's contact to provide Xerox copies of 3500 material, Grand Jury testimony, and other information which was in the files of the United States Attorney's Office." If documents were removed from the files, they were removed temporarily and only for the purpose of reproduction. The Government does not contend that any were permanently removed.

Rosner moves to dismiss this Count on the ground that 18 U.S.C. § 2071 does not proscribe mere photocopying. For the reasons stated below, I agree.

After a careful study of the sparse history and limited previous application of Section 2071, I conclude that its purpose is to prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction or removal. The statute is quite old, its original version having been enacted in 1853. (See 10 Stat. 170) Despite its antiquity, legislative history is almost wholly lacking. It has been, however, the subject of careful analysis by a District Judge for the Eastern District of Michigan in 1887. In speaking of Section 2071(a)'s predecessor. Section 5403[3] of the Revised Statutes, that Court said:

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and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States."

[3] Section 5403, Revised Statutes:

"Every person who willfully destroys or attempts to destroy, or, with intent to steal or destroy, takes and carries away any

"It is manifest that this statute is not broad enough, and was not intended to punish the mere larceny or theft of the papers or documents as property, but that the essential element of the offense is the specific intent to destroy them as records of a public office; or, in other words, to obliterate or conceal them as evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs, be that effect or usefulness what it may." United States v. DeGroat, 30 F. 764 (E.D.Mich.1887).

The First Circuit later came to a similar conclusion, holding that its purpose was "to preserve [papers, documents, and files] as evidence relating to things which concern the public and the government." McInerney v. United States, 143 F. 729 (1st Cir. 1906).

One Court has considered the applicability of this statute in a strikingly similar situation. In Martin v. United States, 168 F. 198 (8th Cir. 1909), the defendant was indicted under Revised Statutes § 5408,[4] the antecedent of § 2071(b). He was accused of having withdrawn from the

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record, paper, or proceeding of a court of justice, filed or deposited with any clerk or officer of such court, or any paper, or document, or record filed or deposited in any public office, or with any judicial or public officer, shall, without reference to the value of the record, paper, document, or proceeding so taken, pay a fine of not more than two thousand dollars, or suffer imprisonment, at hard labor, not more than three years, or both."

[4] Section 5408, Revised Statutes:

"Every officer, having the custody of any record, document, paper, or proceeding specified in section fifty-four hundred and three, who fraudulently takes away, or withdraws, or destroys any such record, document, paper, or proceeding filed

office of the commissioner for certain Indian tribes a roll containing names of Indians, copying the roll during evenings and weekends, and then returning it to the office. Such conduct was held not to violate that section. The Court reasoned that the words "take away and withdraws" in the statute must be construed with the word "destroys" to mean "a taking away or withdrawal whereby some injury is intended, attempted or inflicted . . . upon the document or record withdrawn." It noted that the statute was not intended to make criminal a removal "which in no way interferes with the lawful use of the record or document in its proper place." The indictment was quashed.

Each of these Courts recognized, moreover, that the predecessors of Section 2071 were not larceny statutes. The District Court in *DeGroat* contrasted the statute with Chapter 144, 18 Stat. 479,[5] the predecessor of 18 U.S.C.

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in his office or deposited with him or in his custody, shall pay a fine of not more than two thousand dollars, or suffer imprisonment at hard labor not more than three years, or both; and shall, moreover, forfeit his office and be forever afterward disqualified from holding any office under the government of the United States."

[5] Chapter 144, 18 Statutes at Large 479:

"Any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

Sec. 2. That if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to

§ 641,[6] the specific purpose of which, the Court noted, was to prevent larceny. This distinction was reinforced by the decision of the draftsmen of the 1948 revision of Title 18 to eliminate the phrase "with intent to steal" from Section 2071 because theft was thought to be covered by Section 641. (A comparison of the original version of Section 2071,

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convert to his own use or gain, any money, property, record, voucher, or valuabe thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined."

[6] 18 U.S.C. § 641:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

set out in Footnote 2, supra, with the present version, set out in Footnote 1, indicates the change.)

Section 2071 has not been used to prosecute larceny. It has instead been customarily employed where Government records have been mutilated or destroyed. See, e.g., Kaphan v. United States, 264 F. 323 (9th Cir. 1920); Davidson v. United States, 292 F. 750 (3rd Cir. 1923); Husar v. United States, 26 F.2d 847 (9th Cir. 1928). In recent years, the records involved have frequently been Selective Service System files. See, e.g., United States v. Cullen, 305 F.Supp. 695 (E.D.Wis.1969). United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), cert. denied 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970); United States v. Chase, 309 F.Supp. 430 (N.D.Ill.1970), mandamus granted 435 F.2d 1059 (7th Cir. 1970). It has also been used to prosecute the removal of Government records. See United States v. Coplon, 88 F.Supp. 910 (S.D.N.Y.1949); Coplon v. United States, 89 U.S.App.D.C. 103, 191 F.2d 749 (1951), cert. denied 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 960 (1951). The essence of the offense charged in such prosecutions has not been larceny, for which Section 641 was available, but the rendering of information unavailable to the Government.

I am therefore compelled to conclude that Section 2071 does not embrace any and all instances of removal of Government records; it proscribes that removal which deprives the Government of the use of the records. That is not the type of removal involved here. There is no allegation that the documents themselves were tampered with, or that the Government was deprived of their use. At most, the Government argues for what might be termed "constructive destruction"; that is, although the documents were not

physically destroyed, their utility in the Government's pending prosecutions was destroyed because of their premature disclosure. Such an argument may have some superficial appeal, but I am reluctant to broaden the reach of a criminal statute through such an unprecedented construction. It is axiomatic that criminal statutes must be narrowly construed, and further, it would seem, broadening Section 2071 by including the concept of "constructive destruction" could easily render the statute itself dangerously vague.

In its brief, the Government relies heavily, if not exclusively, on United States v. Bottone, 365 F.2d 389 (2d Cir. 1966), cert. denied 385 U.S. 974, 87 S.Ct. 514, 17 L.Ed.2d 437 (1966). There, the Second Circuit considered the applicability of 18 U.S.C. § 2314, involving the interstate transportation of stolen property, to the photocopying of documents. The Court held that even though photocopying was the only criminal activity alleged, an offense was nevertheless made out because "[w]hen the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial." The Government in citing *Bottone* appears to ignore that the core of the offense charged in 18 U.S.C. § 2314, as the above quotation indicates, is larceny. It is obvious that frequently the transmission of the information contained in documents is just as larcenous as theft of the documents themselves. Hence, had the defendants in the instant case been indicted under 18 U.S.C. § 641, the reasoning of *Bottone* would be fully applicable. But, as I have already pointed out, this indictment alleges no such crime. Section 2071 is not concerned with the transmission

of information, as Section 641 arguably is; *Bottone*, supra, therefore is not relevant.

In conclusion, I hold that Count 3 of the Indictment, as supplemented by the allegations in the Government's memorandum of law, fails to state an offense under 18 U.S.C. § 2071. Count 3 of the Indictment is dismissed.

III. *Bribery of Public Official*

Counts 4 through 8 of the Indictment charge the defendants with giving (or aiding and abetting the giving of) money to a public official on five different occasions in October, 1971 with intent to influence his official acts in violation of 18 U.S.C. § 201(b).[7]

Though the indictment does not identify the public official to whom the bribes are alleged to have been given, the supplemental bill of particulars ordered by the Court reveals that that individual was Special Assistant United States Attorney Nicholas Scoppetta.

Rosner nonetheless contends that these counts are legally insufficient because the indictment fails to name Scoppetta.

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[7] 18 U.S.C. § 201:

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty."

Alternatively, he argues that it is illogical to charge him with bribing a public official since the Government concedes that he never made a direct offer to a public official.

The Government, on the other hand, contends that the indictment, as supplemented by the supplemental bill of particulars, alleges all the elements of the crimes charged in Counts 4 through 8 of the Indictment and is therefore legally sufficient.

The unstated premise of the movant's argument is that a bill of particulars cannot save an otherwise invalid indictment. This principle, of course, is well settled in our jurisprudence. See Russell v. United States, 369 U.S. 749, 764, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1932). However, it does not necessarily follow that the Government's failure to name Scoppetta as the public official makes the indictment impermissibly vague.

The essential function of an indictment is to provide the accused with a description of the particular act he is alleged to have committed so that he will be able to defend himself against the accusation. Russell v. United States, supra; United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970). This principle is derived directly from the Sixth Amendment guarantee of the right to be informed of the nature and cause of an accusation and is basic to our adversary system of justice. United States v. Tomasetta, supra. Cf. United States v. Agone, 302 F.Supp. 1258 (S.D.N.Y. 1969). Indeed, unless the accused is supplied with sufficient information to identify the conduct which the Grand Jury has deemed adequate to support an indictment, he is left at the mercy of unfettered prosecutorial discretion. Such power "to roam at large" in this fashion

is not allowable. Russell v. United States, supra, 369 U.S. at 768-771, 82 S.Ct. at 1038.

However, it is essential to note that a fair description of a crime for purposes of permitting an adequate defense necessarily varies with the nature of the offense and the peculiarities of defending against the charge involved. See United States v. Tomasetta, supra, at 979; United States v. Agone, supra, at 1260-1261. The question is whether the indictment as a whole conveys sufficient information to properly identify the conduct relied upon by the Grand Jury in returning the indictment.

Counts 4 through 8 of this Indictment charge the defendants with indirectly having given money to a public official of the United States with the intent to induce him to do specified acts in violation of his duty. Thus, this is not a case in which Rosner can be convicted for an offense completely separate from that for which he was indicted. He has been advised of the name of the alleged intermediary and the date and place of each alleged offer. Under these circumstances, I find that this is a case in which the accused has "been fully protected by a bill of particulars." United States v. Polakoff, 112 F.2d 888 (2nd Cir. 1940).

Defendant Rosner's alternative argument does not require extended discussion. The fact that the defendant is alleged to have given Scoppetta money through an intermediary does not affect the sufficiency of the indictment. Section 201(b) expressly prohibits "indirect" as well as direct bribes. See United States v. Braver, 450 F.2d 799 (2nd Cir. 1971), cert. denied 405 U.S. 1064, 92 S.Ct. 1493, 31 L.Ed.2d 794 (1972); United States v. Cogan, 266 F.Supp. 374 (S.D.N.Y. 1967).

Accordingly, the motion to dismiss Counts 4 through 8 as legally insufficient is denied.

Appendix E

IV. *Conspiracy*

The remaining count charges conspiracy.[8] The defendant argues that this count must fail to the extent that the facts do not make out the substantive offenses charged in the indictment.[9]

The short answer to this contention is that with the exception of the third Count, the facts alleged are sufficient to establish those substantive offenses.

However, even assuming otherwise, Rosner may still properly be charged with conspiracy. Williamson v. United States, 207 U.S. 425, 446-447 (1908); United States v. Ventimiglia, 145 F.Supp. 37, 44-45 (D.Md.1956), rev'd on other grounds, 242 F.2d 620 (4th Cir. 1957); United States v. Perlstein, 126 F.2d 789 (3rd Cir. 1942), cert. denied 316 U.S. 678, 62 S.Ct. 1106, 86 L.Ed. 1752 (1942). Conspiracy is a separate and distinct offense from the crime that is its object and does not require the commission of any completed substantive offense. Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1948).

United States v. Ventimiglia, supra, illustrates this point. In that case, the defendants were charged with unlawfully paying and conspiring to pay money to a labor representative of corporate employees. The evidence ad-

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[8] Count 1 charges Rosner with conspiring to: (1) obstruct justice in violation of 18 U.S.C. § 1503; (2) receive stolen Government documents in violation of 18 U.S.C. § 641; (3) remove Government documents in violation of 18 U.S.C. § 2071; (4) defraud the United States in violation of 18 U.S.C. § 371; and (5) bribe a public official in violation of 18 U.S.C. § 201(b).

[9] All of the substantive counts of the indictment are based on the allegations underlying the conspiracy charge. However, there is no substantive charge which corresponds to the charge that the defendant conspired to receive stolen Government documents in violation of 18 U.S.C. § 641.

duced at trial however, established that the person to whom the money was paid was not a qualified labor representative within the meaning of the statute prohibiting such payments. Though the Court granted the defendants' motion for a judgment of acquittal as to the substantive charges, it denied the motion as to conspiracy. The Court said:

> "For liability, it is sufficient if the end for which the defendants conspired and toward the consummation of which an overt act was done, would have been unlawful if consummated as defendants planned." 145 F.Supp. at 45.

The conspiracy charged in Count 1 of this Indictment is alleged to have had five objects. However, in view of the fact that I have dismissed Count 3 for legal insufficiency, it is clear that Rosner cannot be charged with conspiring to violate 18 U.S.C. § 2071.

Accordingly, defendant's motion to dismiss Count 1 of the Indictment is denied, but all references to 18 U.S.C. § 2071 is ordered stricken.

V. *Motion to Suppress Evidence*

The defendant has also moved for an order suppressing any and all evidence obtained from him in violation of his right to counsel under the Sixth Amendment. He argues that a significant part of the evidence that will be used against him was obtained by Detective Leuci in conversations with him while he was under another indictment [70 Cr. 1030; see 347 F.Supp. 442 (S.D.N.Y.1972) and 464 F.2d 845 (2nd Cir. 1972)]. Rosner believes that tapes of those conversations, as well as Leuci's account of them, will be

introduced in evidence at trial. He urges that the introduction of such evidence will violate the holding of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). *Massiah* held that where federal agents deliberately elicited incriminating statements from a defendant after indictment in the absence of his counsel, the defendant's rights under the Sixth Amendment were violated and such statements could not be used against him at trial. The holding of the Court in *Massiah* was, however, a limited one. The Court noted (at p. 207):

> "[w]e do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial."

The question presented for resolution here is whether incriminating statements, elicited from a defendant then under indictment, must be suppressed at a subsequent trial on a different charge. I shall assume for the sake of argument that the statements made in defendant Rosner's conversations with Leuci would not have been admissible at the trial of the previous case. Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), sheds light on whether a violation of Sixth Amendment rights during an earlier proceeding will taint evidence offered at a later one. There, a Government informer attended meetings of defendants and their lawyers during a trial that ended in a hung jury. Evidence supplied by that in-

former was instrumental in causing a subsequent indictment from bribing members of that jury. It was argued in *Hoffa* that the presence of a Government informer on premises used by defendants to confer with their lawyers violated the Sixth Amendment because the confidence of the attorney-client relationship was intruded upon. (That is, of course, a Sixth Amendment violation different from that alleged here and in *Massiah*.) The Court assumed *arguendo* that this conduct was violative of the Sixth Amendment, and suggested that introduction of the informer's evidence at the original trial would have invalidated a conviction. But the question before the Court there, as here, was whether the evidence thus gleaned by an informer was inadmissible at a subsequent trial on a different charge. The Court concluded that "even if . . ., a situation could be hypothesized in which the Government's previous activities in undermining a defendant's Sixth Amendment rights at one trial would make evidence obtained thereby inadmissible in a different trial on other charges, the cast now before us does not remotely approach such a situation." This was found to be so because the incriminating statements of the defendant related to the commission of a separate offense, the attempted bribery of jurors, that bore no relation to the crimes about which the informer was attempting to elicit information for the first trial.

The Second Circuit has come to a similar conclusion. In United States v. Edwards, 366 F.2d 853 (2nd Cir. 1966), it stated "we do not read *Massiah* as forever immunizing a defendant under indictment for a distinct and unrelated crime from the normal techniques employed by law enforcement officials to investigate other and wholly separate offenses." 366 F.2d at 873.

Appendix E

I find that in the instant case, the alleged attempt by the defendant to obtain Grand Jury minutes, 3500 material, and the draft of an indictment was an offense wholly unrelated to the crime of subornation of perjury for which he was awaiting trial in 70 Cr. 1030. Accordingly, defendant's motion to suppress all evidence of his conversations with Detective Leuci is denied.

To summarize, the motion to dismiss is granted as to Count 3 and as to all reference to 18 U.S.C. § 2071 in Count 1. The motion is denied in all other respects. The motion to suppress is also denied.

It is so ordered.

FILED
MAR 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1973

No. 73-1062

EDMUND ROSNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introduction

This supplemental brief in support of the petition for certiorari is being filed as the result of this Court's recent decision—rendered after the original petition was filed—in *Joshaway Davis* v. *Alaska*, 14 Cr.L.Rep. 3113 (February 27, 1974) which governs an important issue in this case (see petition for certiorari at pp. 34-36). Normally, petitioner would have waited to make this argument in a reply brief. But the government is now several weeks late in filing its response to the petition, and there is no assurance that any response will be filed, or that there will be sufficient time for the petitioner to file a reply brief if a government response is belatedly filed. Accordingly, we have decided to employ the format of a supplemental brief to argue that

this Court's decision in the *Davis* case requires either A) a remand for a new trial; or B) a remand to the Court of Appeals for reconsideration in light of *Davis*.

Argument

Petitioner respectfully requests this Court to remand the instant case in light of *Davis* v. *Alaska*, which is indistinguishable from, and dispositive of, the instant case. In this case, the defendant's lawyer served subpoena's upon the Police Department's Internal Affairs Division and the Bronx District Attorney's office in order to obtain information concerning Robert Leuci, the Government's main witness against Rosner (Trial Transcript at p. 13).[1] Attorneys for the New York City Police and the Bronx District Attorney opposed disclosure of some of the material on the ground that it would be in violation of state law requiring confidentiality (*Id.* at 34).[2] The trial court, stating that he was "unaware of any precedent that permits anybody to rummage around in raw files" (*Id.* at 23), ruled that the files were not producible to the defendant's lawyers (*Id.* at 41, 203), but agreed to inspect them himself *in camera* (*Id.* at 204). After inspecting them, he ruled that he would not order the government to "turn over any part of those files to you. . . ." (*Id.* at 338), since they contained "no indica-

[1] Some of the records in issue had been turned over previously to the U.S. Attorney's office and others had been retained by the local authorities. Rosner's lawyer sought their production (*Id.* at 14), under "constitutional subpoena power and also pursuant to Rule 17 . . ." (*Id.* at 21). Rosner's attorney agreed to be bound by an order "that this material may not be disclosed outside of the processes of this Court" (*Id.* at 25).

[2] Rosner's attorney alleged that he had received information that Leuci had been involved in extensive narcotics violations and shakedowns and that a tape recording detailing Leuci's criminal record, which had been in the possession of the U.S. government, had been deliberately destroyed (*Id.* at 20).

tion of discipline". Premising his decision on the assertion that the requested files were confidential under New York law (*Id.* at 338), he held that the authorities did not require the disclosure of anything short of actual discipline (*Id.* at 339).

At the trial on direct examination by the government, Leuci admitted to being involved in four instances of corrupt activities from late 1966 through the middle of 1967 (A 24-25, 214), but he vigorously denied on cross-examination any other illegal activities (A 225, 241, 245).[3] After the conclusion of the trial, defendant moved for a new trial on the ground of newly discovered evidence relating to Leuci's criminality. At the hearing on that motion, Rosner's lawyer again sought permission to see the IAD files (Transcript of January 26, 1973, at page 20). Though the trial judge acknowledged that there "were a number of things [in the file] that [Rosner's lawyer] might have found interesting" (*Id.* at 29), he again denied the request. But he did order the "IAD file [to be] preserved" so that "if the Court of Appeals wants to see it, it can". (*Id.* at 32).

The Court of Appeals affirmed the conviction without passing on this issue, despite the fact that subsequent to the District Court's decision quashing the subpoenas, the New York Supreme Court held in *People* v. *Sumpter*, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sp.Ct. N.Y. Co. 1973), that personnel records of police officers who are expected to be

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[3] It is of course clear that where a government witness has, on direct examination by the government, affirmatively denied committing crimes (or as in this case, where he has denied committing more than four specified crimes) the defendant may establish that he did commit such crimes and that his denial was a lie. *Walder* v. *United States*, 347 U.S. 62, 65 (1954); *United States* v. *Keilly*, 445 F.2d 1285 (2d Cir. 1971); *United States* v. *Cuadrado*, 413 F.2d 633, 635 (2d Cir. 1969); *United States* v. *Beno*, 324 F.2d 582, 588 (2d Cir. 1963); see also *Giglio* v. *United States*, 405 U.S. 150 (1972); *People* v. *Robertson*, 12 N.Y. 2d 355 (1963).

prosecution witnesses *are not confidential* under New York law and are producible if they could be of any use to the defendant in preparing his cross-examination or could serve any other legitimate defense purpose.

This Court's decision in *Davis* v. *Alaska* plainly controls the instant case. In *Davis*, the trial court—acting pursuant to an explicit state statute—granted a protective order to prevent any reference to the juvenile records of the government's key witness. Despite the obvious and accepted state interest "to preserve the anonymity of a juvenile offender", this Court held that the protective order denied defendant his constitutional right to cross-examination.

> . . . [T]he right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case —is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness.
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> • • •
>
> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. 14 Cr.L.Rep. at 3121.

The *Davis* case is indistinguishable from the one at bar. Here, too, the state asserted—and the trial court relied

on—an alleged interest in privacy. Moreover, the interest at issue in this case—the confidentiality of police disciplinary records—is far less compelling than the interest at issue in *Davis*. The only argument for confidentiality alluded to by the trial judge here was that the records requested contained "no indication of discipline". The weakness of this proposition—that disciplinary files are producible only if discipline has actually been imposed—is patent. It is universally recognized that the police department is often reluctant to impose disciplinary sanctions on its own even in cases where discipline is plainly warranted. See, e.g. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Surely, it is possible—and that is all a defendant need show in the context of a constitutional exercise of the subpoena power—that the records could contain evidence of wrongdoing that, for one reason or another, did not result in discipline; but which could be put to proper and important use by a defense lawyer. The embarrassment to a professional adult policeman of the limited revelation[4] of his disciplinary file is an interest far less deserving of judicial protection than the embarrassment to a juvenile. In any event, the state of New York has not seen the policeman's embarrassment as an interest warranting either legislative or judicial protection (*People* v. *Sumpter, supra*); whereas the state of Alaska did have a statute explicitly prohibiting the revelation of juvenile records. Despite this statute, the Court held that if the government wanted to protect the juvenile witness from embarrassment, it should have refrained "from using him to make out its case". In this case —as in *Davis*—the government "can not, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interests in the secrecy of juvenile criminal records", especially where, as

[4] See note 1, *supra*.

here, the interest in the secrecy of police disciplinary files, has not even been recognized by the State.

In the instant case, as in *Davis*, the critical issue was the witnesses' motive in testifying against the defendant. The instant petitioner's counsel sought to show that Detective Leuci had been motivated to make the case against petitioner (and others) because of his own illegal dealings in narcotics and his fear of prosecution and/or discipline. By denying petitioner's counsel access to the subpoenaed files, the government and the Court prevented him from developing the issue of bias before the jury. What this Court said in *Davis* is precisely on point in the instant case:

> . . . While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis*, 384 U.S. 1, 3" Smith v. Illinois, 390 U.S. 129, 131 (1968).

Although defense counsel was, in this case, permitted *to attempt* to cross-examine Detective Leuci on the issue of his motive, he was denied the adversary tools necessary "to make any such inquiry effective". Without access by counsel to the information contained in the subpoenaed files, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . ." Moreover, in the instant case—unlike in *Davis*—the government's witness explicitly denied having committed the crimes at issue. Access to the subpoenaed files would have permitted defense counsel to attempt to establish that Detective Leuci had perjured himself by his denials.[5]

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[5] See note 3, supra. In limiting disclosure to instances of actual discipline, the trial judge was obviously confusing the standard for *questions that might be asked on cross-examination*, with the standard *for information that might be useful to a defense lawyer in providing leads for further investigation that might produce information that would be used on cross-examination.* Assuming arguendo that the Judge was correct in his conclusion that bare allegations of wrong-doing that did not lead to discipline may not —by themselves—form the basis for cross-examination questions, certainly that is not the relevant issue. The issue is whether the subpoenaed material might form "a basis for further investigation". See cases cited in A.B.A., Discovery and Procedure Before Trial at p. 77. It is clear that such material is producible. As the Supreme Court said in *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967): "There can be little doubt that the defense might have made effective use of the report at trial *or in obtaining further evidence*". (Emphasis added.) See also *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968). There can be no doubt that a complaint file—*which admittedly did contain specific accusations of wrongdoing against Detective Leuci*—(see transcript of January 26, 1973 at p. 9)—would have provided leads for further investigation. Nor did trial counsel fail to raise this point at trial. He plainly pointed out the distinction between information that could be used directly as the basis for a question on cross-examination, and information that would provide leads for further investigation. He specifically requested "information contained in that file which coupled with some information I have takes a complaint letter from something which seems to be unfounded into something which may well be factual" (*id.* at 26).

Since the *Davis* case, decided after the Court of Appeals decision in this case, is now the leading controlling precedent on this issue, petitioner respectfully requests this honorable Court either A) to reverse the conviction and remand for a new trial; or B) to remand the case to the Court of Appeals for reconsideration in light of *Davis*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, p. 11a) is reported at 485 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1973 (Pet. App. B). A petition for rehearing with a suggestion for rehearing *en*

banc was denied on November 9, 1973 (Pet. App. C). On December 3, 1973, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 7, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law, or, alternatively, whether the court properly denied certain requested instructions on entrapment.

2. Whether the district court should have granted petitioner's motion for a new trial based on the alleged participation in discussions of defense matters between petitioner and his counsel by co-defendants who later, after pleading guilty, provided the government with information about the case, where the district court found that no matters learned at defense discussions were divulged to the government.

3. Whether petitioner was deprived of his right to effective cross-examination when the court refused to give him access to internal police files relating to the government's chief witness, where the court examined the files *in camera* and determined that there were no matters in them appropriate for disclosure.

STATEMENT

An eight-count indictment returned in the United States District Court for the Southern District of

New York charged petitioner and two co-defendants, Nicholas DeStefano and Nicholas Lamattina, with obstruction of justice (Count 2), in violation of 18 U.S.C. 1505 and 2; bribery of a public official (Counts 4 through 8), in violation of 18 U.S.C. 201 (b) and 2; removal of public documents (Count 3), in violation of 18 U.S.C. 2071;[1] and conspiracy to commit those crimes (Count 1), in violation of 18 U.S.C. 371. Lamattina pleaded guilty to conspiracy and one count of bribery, and DeStefano pleaded guilty to all counts.[2] After a jury trial, petitioner was convicted of obstruction of justice (Count 2), three counts of bribery (Counts 6 through 8), and conspiracy (Count 1). Petitioner was sentenced to five years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed the conviction, but vacated the sentence and remanded for resentencing in conformity with its opinion (Pet. App. B).[3] Petitioner has not yet been resentenced.

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[1] This count was dismissed by the court prior to trial on the ground that the acts charged in the indictment did not constitute the offense defined by the statute. *United States* v. *Rosner*, 352 F. Supp. 915 (Pet. App. E, pp. 55a-62a).

[2] Lamattina and DeStefano have each been sentenced to imprisonment for a year and a day, the former on February 19, 1974, and the latter on February 20, 1974.

[3] The case was remanded for sentencing by a different district judge because the original sentence had been based in part upon a prosecutor's report charging petitioner with seventeen alleged incidents of corruption, which defense counsel had not been given an opportunity to attempt to refute (Pet. App. B, pp. 40a-45a).

The facts are detailed in the opinion of the court of appeals (Pet. App. B, pp. 13a-20a), and we will summarize them here.

1. Background

In February 1971, almost eight months prior to any of the transactions which formed the basis of this case, Detective Robert Leuci of the New York City Police Department agreed to assist federal and state authorities in conducting investigations into the criminal justice system in the city of New York (T. 165).[4] In March 1971, Detective Leuci agreed to hold himself out as a corrupt policeman ready to assist anyone who wanted his services (T. 166). In August 1971, a federal grand jury was investigating the dismissal of a state narcotics case against one Felix Martinez, in an effort to determine whether the case was dismissed as a result of bribery. Targets in the investigation included the arresting officers and Dominick Marcone, a bail bondsman (T. 112-115). Detective Leuci was asked by the United States Attorney's Office to investigate the Marcone matter in an undercover capacity (T. 116).[5] Consequently, on September 28, 1971, Detective Leuci established contact with Nicholas Lamattina, also a city police detective and later a co-defendant in the instant case (T. 226-227). Detective Leuci told Lamattina that

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[4] "T." refers to the transcript of the trial.

[5] There is no evidence that petitioner was involved in the Marcone matter.

he had a contact in the United States Attorney's Office who was active in the Marcone investigation and who could possibly help Lamattina and his friends (T. 170-171).

Lamattina and Detective Leuci met on September 30, 1971, and Lamattina implicated Nicholas DeStefano, a private investigator and also an eventual co-defendant in the instant case, in the Marcone matter (T. 175-177).[6] Lamattina had arranged on his own for Detective Leuci to meet with DeStefano and Marcone later that day (T. 177); after their discussion, they went to a restaurant to meet them (T. 181, 184-185). Following discussion of the Marcone case (T. 182-187), Detective Leuci overheard DeStefano say to Lamattina that the "Rosner thing is important to me, too" (T. 188). After some additional discussion about the Marcone case (T. 188-191), DeStefano said to Detective Leuci, "You know, you can help me with something else, something else I am interested in" (T. 191). Leuci replied that he knew DeStefano meant "the Rosner situation" (T.

[6] Six of the meetings (those held on September 30 and October 12, 13, 15, 18, and 19, 1971) were tape recorded by means of electronic equipment worn by Detective Leuci. Transcripts were available to defense counsel and portions were played for the jury. Because petitioner, Lamattina, and DeStefano were sometimes suspicious and searched Detective Leuci (see, *e.g.*, T. 197, 208, 224), he did not take the risk of wearing the equipment at all of the meetings, and consequently not all of the meetings were recorded.

191).[7] DeStefano then asked Leuci to approach his contact about the matter immediately, because he wanted to know "how tight the case [was]" (T. 191-192). A meeting was arranged for the next day, October 1, 1971 (T. 192-193, 195); however, when DeStefano told Leuci he wanted to bring Rosner along, Leuci said he did not like the idea of having Rosner at the meeting (T. 193-194). Detective Leuci was not investigating Rosner at this time (T. 454-455, 1208).

Petitioner did not attend the meeting on October 1, 1971. DeStefano told Detective Leuci that the reason was that petitioner felt "he had the case beat" but that petitioner would be in touch if the need ever arose. Leuci did not press to meet petitioner (T. 200). At this meeting only the Marcone case was discussed (T. 198-200).

2. Facts of this Case

On October 4, 1971, Detective Leuci met with DeStefano, Lamattina, and petitioner. After some discussion of the Marcone case, petitioner asked De-

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[7] The "Rosner situation" was a case, *United States* v. *DiStefano* (sic), *Rosner, et al.*, 464 F. 2d 845 (C.A. 2), in which Rosner and DeStefano had been indicted on charges of suborning perjury and procuring false alibi testimony from one Pedro Hernandez and others at a federal narcotics trial held in March 1967. This indictment was ultimately dismissed for failure of the government to prosecute due to the disappearance of its chief witness, Pedro Hernandez, who turned up in Mexico after the statute of limitations had run. The case will be referred to as "*Rosner I*," following the form of the court of appeals; petitioner refers to the case as "*Hernandez*."

tective Leuci, "Can your friend help us in our case [*Rosner I*]" (T. 213). After Detective Leuci indicated that he probably could help, petitioner stated, "Well I would like your friend to get me 3500 material" (*ibid.*).[8] Petitioner also stated, in reference to witnesses in the *Rosner I* case, "It is my understanding that two are good and two are bad, and I would like to find out what two are good and what two aren't good, and if, in fact, do they have all four witnesses" (T. 214). After a discussion of payment for Detective Leuci's contact (T. 214-215), petitioner gave DeStefano some money, and DeStefano passed $400 to Leuci (T. 216, 219; Count 4). DeStefano told Leuci privately that he should get petitioner in deeper since he had the money (T. 218), but Detective Leuci never followed this suggestion (T. 632-633). Petitioner then told Detective Leuci that if his contact were able to acquire the documents requested, "there will be a lot more for him in the future" (T. 219).

On October 6, 1971, Detective Leuci met with DeStefano and Lamattina and agreed on a fee for Leuci and his contact (T. 230, 235). DeStefano asked Leuci to get a copy of the proposed indictment in Marcone and information on *Rosner I* (T. 231-232). Petitioner did not attend this meeting.

On October 8, 1971, Detective Leuci met with DeStefano and Lamattina. When Leuci told DeStefano that he had the 3500 material, DeStefano telephoned

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[8] "3500 material" refers to statements of witnesses in the *Rosner I* case.

petitioner (T. 236-237) and then gave Detective Leuci $100 for a night out for Leuci and his contact (T. 237; Count 5). When petitioner arrived he was given the Marcone indictment, which he returned to Detective Leuci, and the 3500 material, which he studied (T. 248-250, 269-270). Petitioner told Detective Leuci that he would be paid $2500 (T. 270). Petitioner and DeStefano asked Detective Leuci other questions pertaining to the *Rosner I* case, especially about a list of witnesses (T. 271-272). As the meeting broke up, petitioner took the Marcone indictment with him to study over the weekend (T. 274).

On October 12, 1971, Detectice Leuci met with DeStefano. During the conversation DeStefano asked Leuci for the grand jury minutes in *Rosner I*, and, after some discussion, Leuci agreed to try to obtain them (T. 285-287). DeStefano then gave Detective Leuci $1150 for services already rendered, stating that the money came from petitioner (T. 288-289, 292; Count 6).

On October 13, 1971, Detective Leuci met with DeStefano and petitioner. Before petitioner arrived, DeStefano asked Leuci if he would find out whether an individual named George Stewart was an informant or not. Leuci agreed to do so (T. 296-298).[*]

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[*] Petitioner had been counsel for Stewart and one of his co-conspirators in a narcotics case, but Stewart testified against the others before the grand jury (T. 645-646, 647). An indictment had been filed against these co-consiprators on October 13, 1971 (G. Ex. 23), but at that time Stewart had been relocated out of New York State by the federal govern-

After the conversation about Stewart, petitioner appeared and there was a discussion about the *Rosner I* case and the grand jury minutes, for which petitioner agreed to pay $1500 (T. 301-302). Leuci saw petitioner hand DeStefano a sum of money, and thereafter DeStefano gave Leuci $850 (T. 306-308; Count 7). Out of petitioner's presence, DeStefano told Leuci that he could not guarantee that Stewart would not be killed if Leuci discovered Stewart's whereabouts (T. 309-310).

On October 15, 1971, Detective Leuci met with petitioner and DeStefano. Leuci reported that he would have the grand jury minutes in a few days. Petitioner asked Leuci questions about the availability of witnesses in the *Rosner I* case (T. 312-313). At one point he asked Leuci to get him the arrest and conviction record of one of the witnesses (T. 313-314). DeStefano reminded petitioner that the Stewart matter had been discussed with Leuci (T. 314). Leuci stated that he had not been able to find out anything (*ibid.*). Petitioner asked Leuci to try again and gave Leuci some background information on Stewart (T. 314-317).

On October 18, 1971, Detective Leuci met with DeStefano and Lamattina and gave them the grand jury testimony in *Rosner I* (T. 319-322).

On October 19, 1971, Detective Leuci met with DeStefano and petitioner. Leuci saw petitioner hand DeStefano something, and, after petitioner left, De-

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ment, and only a handful of people in the government knew his whereabouts (T. 652-653).

Stefano gave Detective Leuci $350 (T. 330-331; Count 8).

In his trial testimony, petitioner acknowledged that he paid DeStefano money intended for Detective Leuci and his contact (T. 881, 910). He admitted receiving the 3500 material and the grand jury testimony (T. 868-876, 911) but claimed that, although at first he declined DeStefano's invitation to meet with Detective Leuci (T. 820-821), he later went along, having been entrapped into doing so by the pressures placed upon him by DeStefano and Lamattina (T. 842, 866-867).[10] He further claimed that he never took the Marcone indictment and that he only intended to obtain information about Stewart out of curiosity (T. 874, 876, 1119).

ARGUMENT

1. Petitioner's contention (Pet. 30-34) that the evidence established entrapment as a matter of law, or, in the alternative, that the trial court refused a proper instruction on entrapment is answered in the opinion of the court of appeals, upon which we rely (Pet. App. B, pp. 23a-29a).[11]

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[10] Petitioner testified that DeStefano continually implored him to become involved. He also testified that DeStefano pressured him with false information, including a possible indictment for murder (T. 834-835, 838-839). Petitioner recites these self-serving allegations as facts (Pet. 4-5).

[11] Petitioner contends that the jury verdict of acquittal on the first two counts of bribery, namely $400 paid on October 4th and $100 paid on October 8th, was based on the jury's belief that petitioner had been entrapped on those occasions

2. Petitioner urges (Pet. 17-29) that the trial court erred in denying his motion for a new trial based on the alleged participation in petitioner's meetings with counsel by petitioner's co-defendants, who later, after pleading guilty, provided the government with information about the case, despite the fact that the court found that no matters learned at defense discussions were divulged to government attorneys.

a. The facts relevant to this issue are set forth in the opinion of the district court denying the motion for a new trial [12] (Pet. App. A, pp. 2a-5a) and in the opinion of the court of appeals (Pet. App. B, pp. 20a-23a, 30a-32a). Briefly, on December 20, 1971, some two months after the transactions for which petitioner had been convicted, Detective Leuci met

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and that therefore the jury would have acquitted him on all counts had the court given the requested instruction (Pet. 33-34). Although the issue of instructions is fully answered in the opinion of the court of appeals, we deem it appropriate to comment further on this claim. While one should not speculate on the rationale of the jury in reaching its verdict, there are reasonable explanations which may have caused the acquittals. The second payment was made to Leuci for a night out on the town, and the jury may have believed that, as a gratuity, it was not attributable to petitioner. The first payment was made before petitioner received any documents, and the jury may have believed that this preliminary payment was adequately covered by the conspiracy count, in which it was listed as one of the overt acts.

[12] This was petitioner's second motion for a new trial. The first was based on newly discovered evidence of Detective Leuci's alleged corrupt activities and was denied by the court on January 26, 1973.

with DeStefano and Lamattina to discuss a matter unrelated to Rosner. During this meeting, they accidentally discovered that Detective Leuci was a government agent. They were immediately taken to the United States Attorney's office where they were informed of the general nature of the evidence against them, and were asked to cooperate with the government. They asked for time to consider the proposal and agreed not to reveal Detective Leuci's activities.[13] From the outset, both DeStefano and Lamattina steadfastly refused to consider involving petitioner in any way (Pet. App. A, p. 2a).[14]

Between December 20, 1971, and July 5, 1972, when the instant indictment was returned, the gov-

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[13] Detective Leuci was involved in a number of investigations of corruption in the New York criminal justice system which were in no way related to petitioner (T. 115-116), and disclosure of his cover would have aborted the investigations then in progress, as happened on June 15, 1972, when New York newspapers published articles outlining Leuci's undercover activities.

[14] Petitioner's contention that once DeStefano and Lamattina had been asked to consider cooperating with the government they became government agents and as such should have been instructed not to attend defense meetings with petitioner is untenable. Such a rule would deprive individuals so solicited by the government of the right adequately to prepare for their own defense through cooperation with their co-defendants, and would surely give rise to Sixth Amendment claims by such individuals. At the time of the government's offer to DeStefano and Lamattina, there was absolutely no expectation that they would plead guilty (Motion T. 67-68, 70-71) ("Motion T." refers to the transcript of the second motion for a new trial).

ernment attorneys met with DeStefano and Lamattina frequently. Most of the meetings were devoted to efforts by the prosecutors to induce them to cooperate with various investigations into corruption in the criminal justice system of New York City. Both generally resisted these efforts, and the prosecutors testified that they obtained little useful information from these conversations. DeStefano did aid the government on one occasion and Lamattina on two occasions; none of this cooperation in any way related to petitioner. Although the government attempted to elicit information from the two men concerning the instant case, neither indicated the slightest willingness to cooperate (Motion T. 118-119, 133-134, 146).

After the return of the indictment against petitioner, DeStefano, and Lamattina, neither DeStefano nor Lamattina met with any government representative until early in November 1972, when DeStefano met with the government lawyers, who again urged him to cooperate. DeStefano persisted in his unwillingness to discuss any aspect of the Rosner case, in which he considered himself a defendant.

On November 16, 1972, four days before the trial began, government attorneys met with DeStefano and Lamattina. They were instructed that the government lawyers would not discuss any of the facts of the trial or any possible defense that they or Rosner might have to the charges, and Lamattina signed a form indicating that he had been so instructed (Defendant's Exhibit C; Motion T. 411-412). DeStefano

refused to sign a similar form, and he was not questioned on that date (Motion T. 139, 141); however he did sign the form at the next meeting, on November 18, 1972 (Defendant's Exhibit A, B; Motion T. 142; Pet. App. B, p. 32a, n. 17).

On November 18, 1972, Lamattina agreed to plead guilty and cooperate with the government; he pleaded guilty on November 20, 1972, before the trial began. DeStefano remained steadfast in his refusal to cooperate until he pleaded guilty on November 21, 1972, after the jury had been selected. DeStefano pleaded guilty to all charges in the indictment; this plea was not the result of any agreement with the government (Motion T. 68).

Subsequent to the guilty pleas, both men engaged in extensive conversations with government lawyers.[15] On November 22, 1972, DeStefano met with government lawyers and discussed matters totally unrelated to the instant case (Motion T. 288-293, 297-298). On November 24, 1972, both men met with the gov-

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[15] The government lawyers did not make tapes or records of these meetings (Pet. 11-12). Generally, potential witnesses are inhibited by the use of a tape recorder or stenographer, and to require that prosecutors record all discussions with potential witnesses would diminish the effectiveness of an important investigative tool. Because the prosecutors were concerned about possible Sixth Amendment claims by petitioner, Lamattina and DeStefano were warned not to divulge any matters learned at defense sessions (Motion T. 70, Pet. App. A, p. 5a). At the hearing, Lamattina, DeStefano, and the government attorneys who had participated in the meetings were examined by petitioner's counsel, and the court was able to reconstruct what had occurred.

ernment attorneys and were questioned about the facts of the instant case, about petitioner's alleged receipt of the Marcone indictment, the source of petitioner's bribe money, and the Reardon case.[16] The only information learned on that date was that petitioner had taken the Marcone indictment with him on October 8, 1971 (as Detective Leuci had testified at trial two days earlier), and that petitioner had participated in the Reardon case. There was testimony that Lamattina's memory of the Reardon case had to be refreshed by DeStefano (Motion T. 144), and petitioner contends that DeStefano learned about the Reardon case from defense meetings (Pet. 28-29). However, the only defense lawyer who testified to any discussion of the Reardon case with DeStefano was Mr. Krieger (Motion T. 461-462), and DeStefano testified that he never volunteered any information which he might have received from Mr. Krieger and that the government lawyers never asked him to divulge such matters (Motion T. 313). Accordingly, DeStefano must have learned about the Reardon case from Lamattina, which is a wholly reasonable inference in light of their joint corrupt activities in the instant case. Lamattina obviously knew about the Reardon case from his own participation in the matter.

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[16] The Reardon case was a state narcotics case in which the government suspected that petitioner had bribed Lamattina, then a New York City Detective, to fail to appear for a hearing on a defense motion to suppress; the result was that the case was dismissed. At trial, petitioner denied any illegal participation in the Reardon case (T. 1004-1006).

DeStefano did not communicate with any government lawyers between November 24, 1972, and the day of the jury verdict. Lamattina met with one government attorney on November 25, 1972, and spoke only about the events in September and October 1971, when he was a participant in the instant conspiracy (Motion T. 437-438).

There was considerable testimony adduced at the hearing regarding DeStefano's, and to a lesser extent, Lamattina's presence at meetings where defense strategy was discussed (Pet. App. A, p. 5a; Pet. App. B, pp. 30a-32a). There is absolutely no evidence that their participation in defense discussions was accomplished with the connivance or planning of the government. Although there were numerous discussions between DeStefano and petitioner and his attorneys before DeStefano agreed to cooperate with the government, he attended only one such meeting after he agreed to cooperate. That meeting took place on November 27, 1972, but DeStefano did not talk to any government lawyers between that date and the conclusion of the trial. Lamattina only attended one defense meeting, on June 30, 1972, long before he agreed to cooperate with the government.

After the hearing, at which DeStefano, Lamattina, government attorneys who had participated in the prosecution, and several defense lawyers testified, the district court made the following findings:

> There is nothing to suggest that either DeStefano or Lamattina ever told any government lawyer anything about defense strategy or the

> nature of defense preparation. Sagor and Morvillo [government attorneys] both testified that at the outset they [DeStefano and Lamattina] had been prohibited from divulging anything of that kind and there is not one shred of evidence that either failed to comply with that instruction (Pet. App. A, p. 5a).
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> It is true that DeStefano and Lamattina gave the government certain information about the facts of the Rosner case on the meetings of November 22 and 24, after they pleaded guilty. However, none of that information was obtained by them as a result of their participation in defense strategy meetings; it was rather the product of their participation in criminal activities (Pet. App. A, p. 7a).

b. Petitioner's contention that the court erred in denying his motion for a new trial is answered in the opinion of the district court (Pet. App. A, pp. 5a-7a) and in the opinion of the court of appeals (Pet. App. B, pp. 29a-39a), upon which primarily we rely. We note additionally that the cases cited by petitioner (Pet. 17-18) are readily distinguishable from the instant case. *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345; and *Coplon* v. *United States*, 191 F.2d 749 (C.A. D.C.), all involved *illegal* electronic interceptions of conversations between the defendants and their attorneys. No such interception was involved here. In *Caldwell* v. *United States*, 205 F.2d 879 (C.A. D.C.), a government agent went to work for the defense and was admittedly asked to ascertain the names of

defense witnesses. Here, as we have shown, neither DeStefano nor Lamattina could be characterized as government agents. In *United States* v. *Rispo*, 460 F.2d 965, 977 (C.A. 3), the status of an informant, who had participated in the commission of the crime in cooperation with the FBI, was concealed by the prosecution from the court, co-defendants' counsel, and even counsel for the informant-defendant. The court granted a new trial, stating that "the factual tableau presented here is shocking," citing the fact that the informant had actually been indicted, that the court had been permitted to appoint counsel for him, that the prosecution in opening statements and in summation had pointed the finger of guilt at this sham defendant, and that his counsel had attended defense strategy sessions and had discussed these matters with him. Neither DeStefano nor Lamattina were sham defendants.

In sum, the court below was correct in holding that cases of the type cited by petitioner "deal[t] with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa* v. *United States*, 385 U.S. 293, 306 (Pet. App. B, p. 37a). This case is entirely different. As the court of appeals held, neither "Lamattina or DeStefano * * * were ever 'planted' by the Government to discover defense secrets" (*id.* at 36a). In the absence of such "corrupting conduct, * * * [t]here is then no need to punish the prosecutor by freeing the defendant. The matter must then proceed to an ultimate adjudication of

whether the defendant was prejudiced in fact" (*id.* at 37a). Here there is not the slightest hint of prejudice.[11]

3. Petitioner requested to see the internal city-police files on Detective Leuci before the trial, during the trial, and at the hearing on first motion for a new trial. In opposing the pre-trial motion, a legal representative of the New York police department argued that, since police officers "have to go out and arrest people, that many letters and many complaints are sent in against police officers that are unwarranted * * *" (T. 15). Nevertheless, in an exercise of caution, the district judge ordered the files produced and examined them *in camera*. The court found that there was no indication in Leuci's file that he had been disciplined in connection with any complaints (T. 339). At trial, Detective Leuci testified that he had been investigated by the police department but had never been disciplined (T. 376-385),

[11] Petitioner claims that he was unable to conduct an effective defense because he gave the task of investigating Detective Leuci to DeStefano and Lamattina, and that, because of the government's approaches to these men, they did not do a thorough job of investigating Leuci. He states that he would not have given this task to them if he had known of the government's approaches (Pet. 29). However, since both DeStefano and Lamattina considered themselves defendants until just before the trial, there is no reason to suppose that they did not do the investigation of Leuci that petitioner expected. In fact, defense counsel knew of at least two witnesses who told him of alleged acts of misconduct on the part of Leuci prior to trial, but counsel decided not to call one of these witnesses, and the second would not meet with him (transcript of hearing on first motion for a new trial, pp. 4-7).

and that no active investigations were pending against him when he started to assist the government in its investigations (T. 628).

Detective Leuci also candidly testified that on four occasions he had aided and abetted police corruption (T. 163-164). He was subjected to extensive cross-examination on his corrupt activities (T. 344-396). He further testified that in February 1971 he met with Assistant U.S. Attorney Nicholas Scoppetta, who at the time was a member of New York State's Knapp Commission, which was investigating police corruption. Leuci permitted Scoppetta to tape record Leuci's discussions of past corrupt activity as a member of the New York police force; however, Leuci insisted that the tapes remain his personal property and extracted a promise from Scoppetta that they would be returned to Leuci upon request. These tapes were later returned to Leuci as promised, and he destroyed them (T. 342-344).[18]

The procedure adopted by the trial court of inspecting the files on Detective Leuci *in camera* to determine if they would have afforded useful material for cross-examination was proper. See *United States* v. *Deutsch*, 475 F.2d 55 (C.A. 5); *United*

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[18] These are the tapes referred to by petitioner (Pet. 35). Petitioner's allegation that Leuci had a criminal record is untrue; Detective Leuci had never been convicted of any crime. Petitioner's allegation (Pet. 34) that Leuci had been involved in corrupt narcotics activities between 1967 and the time of trial has absolutely no support in the record, despite the fact that a hearing was held on Leuci's alleged criminal activities in response to petitioner's first motion for a new trial.

States v. *Beekman*, 155 F.2d 580 (C.A. 2). Since the files contained no records of discipline and since there were no open investigations, the court was correct in denying the defense request to examine them.

Petitioner's contention that there might have been information in the files that might have provided useful leads to the defense (Pet. 35-36, n. 25) is nothing more than an assertion of a right to engage in a fishing expedition.[19] This Court has consistently refused to permit defense counsel to engage in a "fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." *Gordon* v. *United States*, 344 U.S. 414, 419; see also *Taglianetti* v. *United States*, 394 U.S. 316.

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[19] Petitioner's reliance on *Giles* v. *Maryland*, 386 U.S. 66 (Pet. 35-36, n. 25), is misplaced. The reports in that case were police reports of interviews with the State's principal witnesses. Statements in the reports were inconsistent with the trial testimony of those witnesses and indicated possible perjury. In this context, Mr. Justice Brennan, in an opinion for three members of the Court, said: "There can be little doubt that the defense might have made effective use of the report at the trial or in obtaining further evidence." 386 U.S. at 74. This statement has no relevance to reports made by third persons about alleged illegal acts which did not lead to discipline. At best, these reports might have led to witnesses who would have testified about alleged prior illegal acts by Detective Leuci. This testimony would have been inadmissible under the rule prohibiting impeachment on collateral matters. See *United States* v. *Kahn*, 472 F. 2d 272, 279-280 (C.A. 2); *United States* v. *Sposato*, 446 F. 2d 779, 780-781 (C.A. 2). Furthermore, the defense purposely chose not to call at least one witness who would have testified to alleged acts of misconduct on the part of Leuci (transcript of hearing on first motion for a new trial, pp. 4-7).

Petitioner's claim that the decision of the district court on this point, affirmed without discussion by the court of appeals, is in conflict with the decision in *United States* v. *Deutsch*, *supra*, 475 F.2d 55, is not well taken. In *Deutsch*, the government refused to produce an internal post office file on a postman-witness. The court remanded the case to the district court "for examination of the personnel file to determine if it would have afforded useful cross-examination. If not, the judgments stand". 475 F.2d at 58. The district court in the instant case made the very determination that the Fifth Circuit in *Deutsch* said would leave the conviction intact. Accordingly, *Deutsch* supports rather than conflicts with the decision here. Similarly, the case of *People* v. *Sumpter*, 75 Misc. 2d 55, 347 N.Y.S. 2d 670 (Sup. Ct., New York County), cited by petitioner (Pet. 15, n. 13), held that the trial judge should examine the police files to determine if there is anything in them appropriate for disclosure to defense counsel.

Petitioner's claim in his supplemental brief that the decision of the district court is in conflict with the decision of this Court in *Davis* v. *Alaska*, No. 72-5794, decided February 27, 1974, is also unfounded. In *Davis*, the defense wished to show that the testimony of the State's principal witness had been biased by the fact that the witness was on probation for a juvenile delinquency adjudication for robbery both at the time of his original identification of the defendant and at trial. The trial court prohibited reference to the juvenile delinquency adjudication,

relying on state statutes making such proceedings confidential. The safe that the defendant was accused of stealing in *Davis* has been found close to the home of the witness, and the defense theory was that the witness had fabricated a story implicating the defendant in order to divert suspicion from himself. When this theory was pursued on cross-examination, the witness denied he had ever been questioned by police officers before as a potential suspect (slip op. at 5). In light of the witness's juvenile adjudication, this denial was improbable, but the defense was precluded from using the adjudication to undermine the witness's credibility. This Court held that, in those circumstances, the constraint on cross-examination violated the Sixth Amendment. In this case, however, the inquiry petitioner may have been aided in making by disclosure of the files was much further removed from the basic issue of guilt or innocence. Petitioner has made no showing that the files contained materials that were actually required for cross-examination, and the *in camera* inspection by the trial judge showed that there was none.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1974.

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547-926—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1062

EDMUND ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is being filed with the Court because recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility.

BACKGROUND

The indictment, returned on July 5, 1972, charged petitioner and two co-defendants, Nicholas DeStefano and Nicholas Lamatina, with obstruction of justice and other crimes. This indictment grew out of an undercover investigation that had been initiated by the federal government in March 1971 with the aid of Detective Robert Leuci of the New York City Police Department. Detective Leuci agreed to hold himself

out as a corrupt policeman to anyone seeking such services. Specific transactions giving rise to this indictment took place between October 4, 1971, and October 19, 1971, and are summarized at pages 6–10 of our brief in opposition to the petition for a writ of certiorari.

At the trial, the principal government evidence consisted of the testimony of Detective Leuci and tape recordings of some but not all of his meetings with the alleged conspirators, all of whom, except petitioner Rosner, pleaded guilty. On cross-examination Leuci admitted the commission of certain criminal acts but denied the commission of others. Leuci has never been convicted of any criminal offense, and the crimes he has admitted, whether at trial or since, have no relationship whatsoever to the facts surrounding the guilt or innocence of the petitioner.

On December 5, 1972, the jury found petitioner guilty of obstruction of justice, three counts of bribery, and conspiracy. On January 12, 1973, petitioner filed a motion for a new trial based upon newly discovered evidence of additional past criminal acts by Leuci. This motion was denied on January 26, 1973, and the denial was not appealed. On February 5, 1973, petitioner filed a second motion for a new trial on the ground of newly discovered evidence, consisting of allegations that the government had obtained information from petitioner's co-defendants, DeStefano and Lamatina, who had pled guilty, which impaired Fifth and Sixth Amendment rights of petitioner. That motion was denied on March 15, 1973.

The conviction and the denial of the second new trial motion were appealed. The court of appeals

affirmed on September 26, 1973, and a petition for a writ of certiorari was thereafter filed. The petition raised three questions relating to (1) whether or not petitioner was entrapped, (2) whether or not petitioner's Fifth and Sixth Amendment rights were violated by information obtained from the co-defendants, and (3) whether the trial court should have given petitioner's counsel access to an internal police file containing complaints against Leuci. On March 19, 1974, while the petition for a writ of certiorari was pending in this Court, petitioner filed a third motion for a new trial in the district court, based upon allegations of newly discovered evidence of other past criminal acts by Leuci and charging the government with prior knowledge of that evidence. A hearing on that motion has not yet been held.[1]

The brief for the United States in opposition to the petition was filed on April 18, 1974. At that time, no one in the office of the Solicitor General or the Criminal Division of the Department of Justice was aware that Detective Leuci, on the night of April 17–18, 1974, had admitted to officials in the United States Attorney's Office for the Southern District of New York that he had participated in criminal activities beyond those he had admitted during his testimony in this case. This development was called to the attention of the office of the Solicitor General by the office of the United States Attorney for the Southern

[1] Under Rule 33, Fed. R. Crim. P., the District Court can grant no relief until the return of the mandate from the court of appeals.

District of New York on April 30, 1974. Further inquiry into the matter led to the letter from the Solicitor General to the Clerk of this Court on May 7, 1974, requesting that consideration by the Court of the petition be postponed pending the filing of further memoranda by the parties.

Discussion

Because these admissions of additional criminal acts by Leuci contradict his trial testimony denying such acts, this Court is presented with the question of how these disclosures bear on the proper disposition of the petition for a writ of certiorari now before it. As we see the situation, there are three analytically distinct questions before the Court:

First, if the Court is otherwise inclined to grant the petition for a writ of certiorari, should it do so and proceed to consider on the merits the issues it presents, before the questions raised by this newly discovered evidence are resolved?

Second, should this Court, in the first instance, itself undertake to determine whether or not the new admissions by Leuci require that a new trial be granted, or should such a determination be made initially by the district court in connection with the pending new trial motion?

Third, if the Court decides that it is the district court that should first determine whether or not a new trial is required and, further, that the issues raised in the petition for certiorari do not warrant review, should it simply deny the petition, or should it grant the petition for the limited purpose of remanding the case to the district court for a hearing on the motion for a new trial?

1. With respect to the first of the foregoing questions, it remains the view of the United States that, as we argued in our original memorandum, the issues raised by the petition for a writ of certiorari were correctly decided by the court of appeals and do not merit review by this Court. We believe that the new admissions by Detective Leuci have no relevance to the issues raised in the petition and thus do not enhance the suitability of those issues for review by this Court. Two of the issues presented by the petition involve no legal question touching upon Leuci's veracity; the only issue that is arguably relevant to these new admissions by Detective Leuci is the third: whether or not the trial judge properly ruled, after an *in camera* inspection, that Leuci's complaint file should not be provided to the defense. But the correctness of that ruling, made on the record then before the court, cannot turn upon facts subsequently discovered.

Quite apart from these considerations, we understand *Mesarosh* v. *United States,* 352 U.S. 1, to indicate that this Court will not ordinarily proceed to consider on the merits the questions raised by a petition under these circumstances. In that case, all Justices agreed that the Court should not reach the issues presented in the petition "until this cloud [possible perjury by a government witness] upon the integrity of the convictions had been dissolved." 352 U.S. at 20. Although there may be circumstances in which the importance of the issues for any new trial would cause this Court to consider them, we do not believe this is such a case.

2. It is the view of the United States that this Court should not itself undertake to determine whether a new trial is required as a result of the newly discovered evidence. We are advised by counsel for petitioner that he intends to argue that this procedure is required by *Mesarosh*. But we believe *Mesarosh* to be inapposite.

In *Mesarosh*, following the grant of certiorari and shortly prior to oral argument, the Solicitor General disclosed that evidence available to him gave the government reason to believe that a key prosecution witness had repeatedly perjured himself in other proceedings in which he had given testimony similar to that given at trial in the case then before the Court—testimony that went directly to the merits of the charges. The government moved to remand the case to the district court for a hearing on whether a a new trial should be granted. Instead, this Court ordered a new trial.

Mesarosh differs from this case in several important respects. First, and most important, the discovery that the witness had systematically fabricated testimony of the type involved in the case dealt a devastating blow to his credibility.[2] Thus, this Court could reasonably have concluded—and we think did conclude—that the key finding necessary to support an order granting a new trial—that a different outcome on retrial was

[2] This case would be analogous to *Mesarosh*, accordingly, if it were found that Leuci had repeatedly made false accusations of bribery and obstruction of justice against other persons in other proceedings. There is no suggestion that anything of this sort has occurred.

likely—was inevitable. Thus, any court would, in light of the disclosure, have had to grant the motion for a new trial. This Court said as much: "[I]f on a remand the District Court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted." 352 U.S. at 12–13.

No such aura of inevitability surrounds the outcome of petitioner's new trial motion.

While we do not consider it either feasible or appropriate at this time and on this record to argue in full the factual and legal issues that must be considered in connection with any decisions whether a new trial should be ordered in this case, even a brief summary of the facts reveals the complexity of that inquiry and the uncertainty of its outcome.

The critical evidence against petitioner concerned the course of dealings at numerous meetings between Leuci, DeStefano, Lammatina and petitioner. Leuci was the only prosecution witness to attend these meetings. Although many of the meetings were recorded, others were not, and Leuci and petitioner differed as to some of what took place at the unrecorded meetings. The prosecution's view of the evidence was that petitioner was a willing participant in the corrupt scheme, the defense's view that he was a coerced victim. In order to further its theory of the case, the defense endeavored to demonstrate that Leuci was motivated to "make" a case against petitioner in order to avoid prosecution for his own corrupt acts. "The defense

theory was, and is, that the government had agreed not to prosecute Leuci for relatively recent and serious crimes in exchange for Leuci's undertaking to make cases against corrupt (or corruptible) participants in the criminal justice system." (Brief in Support of Defendant's Third Motion for New Trial, March 19, 1974, p. 8.) This attack began with a defense investigation of Leuci before trial, the subpoena of the police disciplinary file in order to pursue further leads, the extensive cross-examination of Leuci, and two post-conviction motions for new trial—one decided adversely to petitioner but not appealed (filed January 12, 1973); the other pending in the district court (filed March 19, 1974).

Before and during trial, Leuci admitted his participation in three different schemes to shake down potential criminal narcotics suspects in exchange for an assurance from Leuci or other policemen that potential investigations against them would not be pursued. These activities were developed in detail on cross-examination, and Leuci admitted receiving sums up to $10,000 in these instances (Tr. 345–367). He conceded that these actions were criminal (*e.g.*, Tr. 348–349, 351), and he testified that he did not expect to be prosecuted for his "criminal activities" (Tr. 396). Although these crimes might not have been as "fresh" as the defense would have liked, the admissions made it clear that Leuci had, himself, committed crimes as serious as those charged against petitioner. While additional admissions of criminal acts would have been cumulative material further impeaching

the trustworthiness of the witness, it is settled law that the discovery of new evidence of an impeaching or cumulative nature is not a ground for a new trial. *E.g., United States* v. *Pfingst,* 490 F. 2d 262 (C.A. 2); *United States* v. *Marquez,* 363 F.Supp. 802 (S.D. N.Y.), affirmed, 490 F.2d 1383 (C.A. 2); *United States* v. *Kahn,* 472 F.2d 272, 287 (C.A. 2), certiorari *E.g., United States* v. *Pfingst,* 490 F.2d 262 (C.A. 2); denied, 411 U.S. 982; *United States* v. *DeSapio,* 456 F. 2d 644, 657 (C.A. 2); *United States* v. *Capaldo,* 276 F. Supp. 986, 987–988 (D. Conn.), affirmed, 402 F.2d 821 (C.A. 2), certiorari denied, 394 U.S. 989; *United States* v. *Fassoulis,* 203 F. Supp. 114, 117 (S.D. N.Y.); *United States* v. *Boisen,* 181 F. Supp. 349, 351 (S.D. N.Y.).

In deciding a motion for a new trial, a court would have to determine whether, in light of the fact that at trial Leuci did admit to the commission of serious crimes, the fact that many important conversations were tape recorded, the fact that petitioner admitted the criminal acts underlying the conviction, and the fact that petitioner, in his testimony, attributed much of his "entrapment" to DeStefano and Lamatina (Tr. 842, 866–868), who were not government agents but are convicted and sentenced co-conspirators, these new admissions of additional criminal acts and possible perjury by Leuci warrant grant of the motion for a new trial.

We submit that these are determinations that should properly be made by the trial judge, who presided at the trial and is fully familiar with the facts of this case. It should be made only after hearing such new

evidence as is available, including evidence bearing on petitioner's allegation, which the United States Attorney denies, and which is potentially critical to the disposition of the new trial motion, that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci.[3] Should the district court, after hearing the pertinent evidence, deny the motion for a new trial, its ruling would, of course, be appealable, ultimately to this Court.

If, despite the foregoing arguments, the Court determines to follow the *Mesarosh* procedure and itself pass initially on the new trial question, the Solicitor General would like the opportunity to submit an additional memorandum setting out at greater length the content of Leuci's new admissions and their bearing on the original trial in thise case, and arguing more fully the merits of the new trial issue. We have not done so at this time for two reasons:

First, as set forth in the May 5, 1974 affidavit of Paul Jay Curran, United States Attorney for the Southern District of New York, submitted in an action brought by the Special State Prosecutor for the State of New York to obtain access to Leuci, 74 Civil 1912, S.D. N.Y.,[4] these newly admitted offenses by Detective Leuci are now the subject of ongoing investigations by Assistant United States Attorneys and by

[3] The absence of knowledge by the prosecution of Leuci's other criminal activities would render them inadmissible for impeachment purposes, since they would not have given Leuci an incentive to testify favorably to the government if the government was unaware of them.

[4] A copy of this affidavit is being lodged with the Court.

agents of the Drug Enforcement Administration and the Internal Revenue Service. Some evidence relating to these offenses has already been presented to a federal grand jury. During this period, it is critical that the information provided by Detective Leuci remain confidential because of the possible impact of public disclosure of that information on the pending investigations, which are not limited to potential criminal acts by Leuci alone.

Second, one of the theories available to petitioner on his motion for a new trial is that the long, complex relationship between Detective Leuci, the United States Attorney's Office, and the prosecution of this case constitutes or entails prosecutorial misconduct. Thus, petitioner's brief in support of a motion for a new trial filed in the district court on March 19, 1974, alleged that "the government has been engaged in a deliberate and massive suppression of evidence, within its files, corroborating Leuci's deep and continuous involvement in illegal drug transactions betweeen 1968 and 1972." (Brief, p. 1.) A preliminary review of the transcript of this trial, the new trial motion papers of the defense, and the memoranda and affidavits of the government in response to those motions, conducted in the office of the Solicitor General, reveals no prosecutorial misconduct. However, our initial review of the evidence also persuades us that it is not feasible for the Office of the Solicitor General to conduct the kind of comprehensive factual inquiry and make the kind of evidentiary determinations that would be required to present this Court with a satisfactory sum-

mary of all relevant evidence bearing on the issue of whether a new trial should be granted.

3. The remaining question is whether, if the Court agrees with us that the new trial issue should be first considered by the district court and that the questions presented in the certiorari petition do not merit further review, the petition for a writ of certiorari should be denied or the petition granted and the case remanded to the district court for the purpose of proceeding with the new trial motion. While we have no objection to the latter course of action (the new trial issue will be fully litigated and petitioner's claims considered on the merits in either event), considerations of judicial economy may favor the former course. There is no reason to leave open the question of the suitability of the issues presented by the pending petition for review by this Court if the Court is able to determine at this time that they do not warrant review. The problems of taint that concerned the Court in *Mesarosh,* where certiorari had been granted and the Court was about to review the case on the merits, would not apply to a mere declination to review non-certworthy issues by means of a denial of certiorari that in no way prejudices the petitioner's right to full consideration by the courts of other, potentially meritorious claims.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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